INDEX

Table of Cases.

Motion for Writ of Certiorari.

Supreme Court of the United States

October Term

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE, *Petitioners,*

against

THE UNITED STATES OF AMERICA, *Respondent.*

COME now, Thomas Agnello, Frank Agnello, Stephen Alba, Antonio Centerino and James Pace, by George Gordon Battle, their counsel, and move this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent United States of America was defendant-in-error and your petitioners were plaintiffs-in-error, and to that end they now tender herewith their petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

GEORGE GORDON BATTLE,
Counsel.

Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES.

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE, *Petitioners,*

against

THE UNITED STATES OF AMERICA, *Respondent.*

To the Honorable Supreme Court of the United States:

The petition of Thomas Agnello, Frank Agnello, Stephen Alba, Antonio Centerino and James Pace, petitioners, respectfully represents:

1. That the said petitioners were indicted in the United States District Court for the Eastern District of New York for the crime of conspiracy to commit the offense of selling heroin and cocaine in violation of the Harrison Act, and after a trial before Honorable EDWIN L. GARVIN and a jury, were convicted and each of the said petitioners was sentenced to be imprisoned for a term of two years at Atlanta Penitentiary and to pay a fine of Five Thousand Dollars.

2. That thereafter by a writ of error to the said United States District Court the said cause was brought on to be heard in the United States Circuit Court of Appeals for the Second Circuit, and on the 28th day of March, 1923, the Circuit Court of Appeals for the Second Circuit handed down its opinion affirming the judgment of conviction.

3. That the judgment of the Circuit Court of Appeals is final and is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination.

4. The ground upon which this writ is requested is that the determination of the Circuit Court of Appeals establishes a new interpretation of Amendments 4 and 5 of the Constitution, and is in direct conflict with the decisions of this Honorable Court. The opinion in this case after stating the facts reads as follows:

> "The question thus raised is one of great importance. May an agent of the Government in a case where he can arrest without a warrant and search the person without a warrant, search also without a warrant the home of the person so arrested? Is such a search and seizure to be regarded as such an 'unreasonable' search and seizure as violated the constitutional rights of Frank Agnello? If it constituted such a violation we must consider whether the property so seized was improperly received in evidence."

And further the opinion states:

> "And in the cases in which the officer may without a warrant deprive a man of his sacred right to his liberty he may without a warrant deprive him of his no more sacred right of property in the articles that may be used in evidence against him upon the trial for the crime for which he is arrested. His home or his office is not more sacred than his person or his liberty. Such a search and seizure is not, in our opinion, the unreasonable search and seizure which the Fourth Amendment prohibits."

5. The can of cocaine which was received in evidence was found *after* the arrest, and in the home of one of

the defendants, several blocks from the house in which the selling actually took place and the persons were arrested. It was offered in evidence on the direct case of the prosecution, but was rejected by the Court as having been obtained through an unlawful search. It was then offered and received in rebuttal, to contradict the testimony of Frank Agnello, given on cross examination.

The can of cocaine was seized, not as the instrument or subject-matter of the offense. It was not seized as property which was subject to confiscation by the United States, since possession is not made an offense under the Harrison Act. It was seized merely for the purpose of being used as evidence, and when received in evidence amounted to compulsory self-incrimination. It is respectfully submitted that no circumstances can render a search for such purpose reasonable or lawful.

As appears by the concurring opinion of Judge HOUGH, this question arose in the *Ganci* case (not reported, copy of opinion is attached to the brief). In that case Judge HOUGH dissented. In this case Judge HOUGH concurs but dissents from the reasoning of the majority of the Court.

A further ground upon which your petitioners ask that the writ of certiorari may be granted is that the indictment is fundamentally defective in that it does not charge a conspiracy to sell heroin or cocaine within the United States. It alleges a conspiracy within the United States to sell heroin and cocaine, but does not charge that the parties planned, combined, or conspired to sell within the United States. It is only sales within the United States that are subject to the regulation of the Harrison Act, and it is only an actual sale within the United States that could be the subject of the substantive offense; the conspiracy therefore to be unlawful

must be a conspiracy to sell within the United States, and the indictment must so allege.

6. A further ground upon which your petitioners ask that the writ of certiorari may be granted is that there was substantial error violating the constitutional right of the defendants to be confronted by the witnesses against them, in that the Court refused to compel the witness Dispenza to disclose his address; the testimony of this witness was the only testimony that directly implicated the defendants Thomas Agnello, Frank Agnello and James Pace in the commission of the crime.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Second Circuit, sitting at the City of New York, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as may seem proper.

And your petitioners will ever pray.

THOMAS AGNELLO,
Petitioner.

GEORGE GORDON BATTLE,
Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS AGNELLO, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition by him subscribed, the facts therein stated are true to the best of his information and belief.

THOMAS AGNELLO.

Sworn to before me this
2nd day of April, 1923.

GEORGE J. LEDERER, Notary Public, New York County; Clerk's No. 63, Register's No. 5077; Bronx Co. Clerk's No. 3, Reg.'s No. 21; Kings Co. Clerk's No. 5, Reg.'s No. 5017; Westchester County Clerk & Register; Commission Expires March 30, 1925.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE,
Plaintiffs-in-Error
(*Defendants below*),

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error,
(*Plaintiff below*).

Before: ROGERS, HOUGH and MANTON, *Circuit Judges.*

O'GORMAN, BATTLE, VANDIVER & LEVY, for Plaintiffs-in-Error.

GEORGE GORDON BATTLE, ISAAC H. LEVY, GEORGE C. DELACY, of Counsel.

RALPH C. GREENE, United States Attorney for the Eastern District of New York.

HENRY J. WALSH, Assistant United States Attorney, of Counsel.

This cause comes here on writ of error to the United States District Court for the Eastern District of New York.

ROGERS, *Circuit Judge.* The defendants have been convicted under an indictment which charged them with the crime of conspiracy to commit the offense of selling

heroin and cocaine without having registered or paid the tax prescribed and in violation of the Act of December 17, 1914 (38 St., ch. 1, p. 785), as amended by Sections 1006, 1007 and 1008 of the Revenue Act of 1918 (40 St., ch. 18, pp. 1057, 1132), commonly known as the Harrison Act. Each defendant has been sentenced to be imprisoned for a term of two years at Atlanta Penitentiary and to pay a fine of $5,000.

The indictment contained two counts. The first charged the offense of conspiring to sell heroin and cocaine in violation of the Harrison Act. The second charged the actual sale of heroin and cocaine in violation of the Act. At the trial and after the testimony was in the defendants moved to dismiss the second count on the ground that it did not allege that the offense occurred within the jurisdiction. This motion was granted and the second count was dismissed as to each of the defendants.

The salient facts are few and simple. On Saturday, January 14th, the defendants Alba and Centerino were approached by two agents in the employ of the Government who stated that they desired to buy some narcotics. The agents were told to return on the following Monday night. At that time they again met Alba and Centerino and were then told that the narcotics would have to be procured. They waited at the house of Alba in Brooklyn while Centerino left for the purpose of obtaining the narcotics. Centerino returned with the defendants Thomas Agnello, Frank Agnello and James Pace. Centerino placed three or four packages on the table and received from Napolitano the sum of $350 in marked bills. There is testimony to the effect that at the time the packages were placed on the table the defendant, Pace, asked the stool pigeons if they had the money and

were ready for business, and when one of them said "Yes" Frank Agnello took the packages out of his pocket and handed them to Thomas Agnello, who put them on the table.

At this point the officers who had accompanied the Government's agents to the house and had been waiting on the outside, and had observed through a window what took place inside, broke into the room and arrested all the defendants. There were found on the person of Frank Agnello three or four other packages containing cocaine. Thomas Agnello was taken into another room and questioned, whereupon he sought to bribe one of the agents. Following this, several of the officers went to No. 167 Columbia Street, Brooklyn, which was occupied as a grocery store and also as a residence by the Agnellos. This was the place from which Centerino, Thomas Agnello, Frank Agnello and James Pace were seen by the officer to leave just after Centerino had gone there to procure the narcotics and from which they returned to the home of Alba with narcotics. On top of a wardrobe in the room occupied by Frank Agnello there was found a can containing cocaine hydrochloride which the officers took into their possession.

It is claimed that the testimony that a can of cocaine hydrochloride was found in the room of Frank Agnello was improperly admitted in evidence since it was obtained through an unlawful search.

And this is the important question in the case. It seems to be admitted that the officers had the right to arrest these defendants without a warrant and had a right without a warrant to search their persons—a crime having been committed in the officers' presence. But it is denied that the officers had any right to go from the place of the arrest to No. 167 Columbia Street, from

which all the defendants but Alba were seen by the officer to emerge a short time before and from which they were supposed to have obtained the drugs which Centerino had informed the Government's agent he was going out to get and there search without a warrant the room of the defendant Frank Agnello. The question thus raised is one of great importance. May an agent of the Government in a case where he can arrest without a warrant and search the person with a warrant, search also without a warrant the home of the person so arrested? Is such a search and seizure to be regarded as such an "unreasonable" search and seizure as violated the constitutional rights of Frank Agnello? If it constituted such a violation we must consider whether the property so seized was improperly received in evidence.

The weight of State authority holds that evidence obtained by an unconstitutional seizure is as much admissible as any other evidence secured by illegal means. *Commonwealth* v. *Dana,* 2 Met. (Mass.), 329; *Commonwealth* v. *Tibbets,* 15 Mass., 519; *Chastaing* v. *State,* 83 Ala., 29; *Scott* v. *State,* 113 Ala., 64; *Starchman* v. *State,* 62 Ark., 538; *People* v. *Alden,* 113 Cal., 264; *State* v. *Griswold,* 67 Conn., 290; *Williams* v. *State,* 100 Ga., 511; *Stevison* v. *Earnest,* 80 Ill., 513, 517; *Trash* v. *People,* 151 Ill., 523; *State* v. *Renard,* 50 La. Ann., 662; *Chiett* v. *Rosenthal,* 100 Mich., 193, 197; *State* v. *Pomeroy,* 130 Mo., 489, 497; *State* v. *Atkinson,* 40 S. C., 363, 371; *State* v. *Mathers,* 64 Vt., 101; *State* v. *Edwards,* 51 W. Va., 220. And in Wigmore on Evidence, vol. 3, sec. 2183, it is laid down that it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain it. And see Harvard Law Review, vol. 35, p. 694.

The Federal courts long followed the rule that a collateral inquiry into the mode in which evidence had been obtained would not be allowed when the question was raised for the first time at the trial. See *Adams* v. *New York,* 192 U. S., 585; *Silverthorne Lumber Co.* v. *United States,* 251 U. S., 385, 392. In *Weeks* v. *United States,* 232 U. S., 383, the Court held that if an application for the return of papers unlawfully seized was made before trial and refused, and then at the trial the papers were received in evidence, over objection, the judgment should be reversed. The same doctrine was laid down in *Gouled* v. *United States,* 255 U. S., 298. That case also asserted that an objection should be sustained and the evidence excluded, although raised for the first time at the trial where the paper had been improperly seized, but the defendant had no knowledge that the Government had possession of the paper until it was offered in evidence. The Court said: "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." In *Amos* v. *United States,* 265 U. S., 213, it was held that if it is clear and undisputed that property used in evidence against a defendant on a criminal trial was procured by the Government through an unconstitutional search and seizure his petition for its return is not too late when made immediately after the jury is sworn, and that his motion to exclude the property and testimony concerning it from evidence should not be denied as inviting a collateral issue.

In the case at bar no application for the return of the property alleged to have been unlawfully seized was made either before or at the time of trial. But the evidence that the can was found in the room searched without a warrant was objected to when it was offered on the ground that it violated the defendant's constitutional

rights in that the Government had obtained possession of it through an unlawful search and seizure. The Court overruled the objection and admitted the evidence. This we think was error under the decisions in the *Gouled* and *Amos* cases—if the seizure was made in violation of the constitutional provisions now to be considered. To hold otherwise would be to allow a rule of procedure to triumph over a constitutional right, and this the Federal courts cannot suffer to be done.

The Fourth Amendment to the Constitution declares that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment declares, among other things, that no person "shall be compelled in any criminal case to be a witness against himself." And the same Article also declares that no person shall be deprived of property "without due process of law."

It may be remarked in passing, as the courts have frequently pointed out, that the unreasonable searches and seizures prohibited by the Fourth Amendment are almost always made to obtain evidence and thus indirectly, in a criminal case, compel a man to give evidence against himself which in that class of cases is condemned in the Fifth Amendment. The two Amendments in this respect "run almost into each other." But the historical explanation of the two Amendments is quite distinct. The Fourth Amendment can be traced to an agitation which was carried on in the eighteenth century and especially the agitation of John Wilkes and the famous decision of Lord Camden hereinafter more fully referred to. The Fifth

Amendment is traced back to an agitation conducted in the sixteenth and seventeenth centuries and especially to the agitation of "Freeborn John" Lilburn.

The Fourth Amendment is justly regarded as one of the most important amendments to the Constitution. It recognizes the right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures. The right was not created by the Constitution. It existed as a common law right before the Constitution was adopted. The Amendment, however, established it as a constitutional right which Congress itself cannot violate. *Boyd* v. *United States,* 116 U. S., 616. The Constitutions of the several States generally contain the same or similar restrictions upon the powers of the governments of the States.

The framers of these constitutional provisions do not undertake to define what searches and seizures are reasonable and what unreasonable. But the intention plainly was to protect the people from unreasonable searches and seizures such as had been practiced in England under general warrants, and, to some extent, in this country in colonial times under so-called writs of assistance. Such searches and seizures the courts held illegal at common law. And the constitutional provision was designed to operate on legislative bodies so as to render ineffectual any attempt by such bodies to legalize by statute what the common law regarded as unlawful because reasonable. It was also intended to operate upon executives and courts, and to make it the duty of the courts to hold invalid every unreasonable search and seizure whether made under the guise of legislative sanction or without the color of any such sanction. *Williams* v. *State,* 100 Ga., 511, 520.

A search of one's person or premises with a view to

the discovery of some evidence of guilt which may be used in the prosecution of a criminal action is unreasonable if it is made without authority of law. So that it becomes necessary to inquire in any particular case whether the search was made by authority of law. For it is well established that in some cases the law authorizes searches without warrant, while in others searches made even under a warrant may be without authority of law. If a search is made under authority of law it is reasonable. If it is not so made it is unreasonable.

It is the general understanding that the purpose of the Fourth Amendment was to prevent any attempt by legislation or otherwise to authorize or justify any unlawful search or seizure. The restriction was intended to operate upon the executive, legislative and judicial departments of the government. But the question whether a search is reasonable or unreasonable within the meaning of the Fourth Amendment is in all cases a judicial question and no other department of the government by any action it may take can make a search reasonable which the courts regard as "unreasonable." The Circuit Court of Appeals in the Fourth Circuit has held that the Fourth Amendment does not protect a critizen from unreasonable searches except those made or participated in by Federal officers or under Federal process. *Kanellos* v. *United States,* 282 Fed., 461; *Kirkley* v. *United States,* 283 Fed., 34. And a like doctrine is asserted by the Circuit Court of Appeals in the Eighth Circuit in *Youngblood* v. *United States,* 266 Fed., 795. See also *United States* v. *Burnside,* 273 Fed., 603. In the instant case the search was made by Federal agents.

The general rule is well established that there is no right to search a man's premises and seize his possessions without a search warrant, and that the warrant

cannot issue or if issued is invalid if the search authorized is an unreasonable one, being contrary to law.

That the right to search for and seize private papers even under a search warrant was unknown to the common law seems conclusively shown by Lord Camden's opinion in the well known case of *Entick* v. *Carrington,* 19 Howell's State Trials, 1029; s. c. 2 Wils. 275, decided in 1765, in the Court of Kings Bench. This right of search and seizure under warrant had been asserted and exercised for a long time before during the arbitrary reigns of the Stuarts and for a long time afterwards, Lord Halifax, Secretary of State, accordingly claimed the right in *Entick* v. *Carrington,* and the matter was fully and elaborately considered by the court in that case and it was unanimously held that no such right existed, and that it was not supported "by one single citation from any law book extant." The question involved in that case was not whether the papers could be seized without a warrant for the papers had been taken under a warrant, but was whether the warrant could issue for such a purpose. Counsel claimed that the power to issue the warrant was contrary to the genius of the law of England, and that however frequently they had been used since the Revolution that fact did not make them lawful, and that the practice of issuing them originated in the oppression and extortion of lords and great men, and that the custom went "no farther back than 80 years." And counsel declared "most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's Bench since that time." The Court held that there was no power even in the Secretary of State to issue the warrant and that it was "wholly illegal and void." An attempt having been made by counsel to justify the sei-

zure by referring to the practice for the search and seizure of stolen goods which was then well established Lord Camden called attention to the fact that the right of search for stolen goods had crept into English law by imperceptible practice, and that Lord Coke denied its legality. It is important, too, to note that in searching for stolen goods a search warrant was required and that there must be an oath by the owner that his goods have been stolen and that he has strong reason to believe they are concealed in the place to be searched. The law as laid down in *Entick* v. *Carrington* has been regarded ever since as settled and Lord Camden's great judgment is one of the landmarks of English liberty. Justice BRADLEY, speaking of it in the Supreme Court in 1885 in *Boyd* v. *United States,* 116 U. S., 616, 626, said: "It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

The use of search warrants is confined to cases of public prosecutions, instituted for the suppression of crime or the detection and punishment of criminals. In such cases their legality has long been recognized as established on the ground of public necessity. In *Adams* v. *New York,* 192 U. S., 585, 598, the Court said:

> "The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizures of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day."

The doubts which at one time were entertained as to the search of a man's premises for stolen goods, for lottery tickets, gambling devices and the like have not gone

to the right to make the seizure without a warrant, but as to whether the right existed to issue a warrant authorizing the invasion of the premises to make a search for such a purpose.

But it is interesting to observe that the courts have held that a statute authorizing a magistrate or judicial tribunal to issue a search warrant which can be availed of by individuals in the course of civil proceedings is unconstitutional, being in violation of the fundamental principle that every citizen is entitled to be free from all unreasonable searches of his houses and possessions. *Robinson* v. *Richardson,* 13 Gray (Mass.), 454. And the constitutionality of statutes authorizing the issuance of warrants to search for intoxicating liquors illegally kept for sale have been challenged in the courts. In *State* v. *Stoffels,* 89 Minn., 205, it was said:

> "No one questions the validity of laws providing for the issuing of warrants for the search, seizure and destruction of implements of gaming, lottery tickets, and obscene books, and other similar articles and means of crime. But it has been questioned by some courts whether intoxicating liquors are property of such character as to be subject to the application of this rule. They do not *per se* fall within the rule, but on principle, and the great weight of judicial authority, it must be held that when they are kept for sale in violation of the laws of the state, and are intended to be used as the subject or means of crime, it is a question solely for the lawmaking power to determine whether they ought to be subjected to the rule we have stated. Therefore statutes authorizing the issuance of search warrants to search for intoxicating liquors illegally kept for sale, and directing their seizure when found, and their forfeiture or destruction, are constitutional. See too *State* v. *Hanson,* 114 Minn., 136."

In what has been said it appears that the common law jealousy protected even against search warrants a man's immunity in his home against "the prying eyes" of government. It let Chatham in his speech on General Warrants to declare in a familiar passage: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." And the maxim that "every man's house is his castle" has been made a part of our constitutional law which no officer of the Government of the United States can violate.

Not all arrests without a warrant are illegal, and not all searches and seizures without a warrant are prohibited. "But it is nowhere said that there shall be no arrest without a warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot or suffered to escape." *Wakely* v. *Hart,* 6 Binn. Pa., 316. However, an arrest without a warrant has never been lawful except in cases where the public security requires it.

It is universally recognized that a peace officer has the right to arrest without a warrant one whom he finds attempting to commit a felony in his presence, or who is committing or has committed a felony in his presence or within his view. *Kurtz* v. *Moffit,* 115 U. S., 487. And this rule applies to any offense punishable by imprisonment in a State prison. And it is a general rule that the officer may arrest without a warrant for a misdemeanor committed in his presence. And an officer at common law may arrest without a warrant one whom he has reason-

able or probable grounds to suspect of having committed a felony.

Under the Federal as well as the State statutes to justify search and seizure or arrest without warrant the officer must have direct knowledge through his hearing, sight, or other sense of the commission of the crime. *Elrod* v. *Moss,* 278 Fed., 123, 130.

The rule as to when a crime is committed in the presence of an officer is well stated in *ex parte Morrill,* 35 Fed., 261, 267, where Judge DEADY held that "A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime." And it is well settled that where an officer is apprised by any of his senses that a crime is being committed in his presence he may arrest without a warrant. 4 Blackstone's Comm., p. 299; 1 Bishop Crom. Proc., secs. 166-171, 182-184; Bryne Federal Cr. Proc., sec. 10; *O'Connor* v. *United States,* 281 Fed., 396, 399; *McBride* v. *United States,* 284 Fed., 416, 419. And it is equally true that in such cases an officer may without a warrant enter a building in which the crime is being committed and may search the same. Wharton's Criminal Procedure, 10th ed., secs. 34, 51. And in the case at bar it is not denied that the agents of the Government had such direct knowledge of the commission of the crime as justified the arrest of the defendants without a warrant and a search of their persons without a warrant.

In the cases in which an officer may make an arrest without a warrant he may without a warrant search the person so arrested. For it is the duty of an officer, making a lawful arrest, to search the person and take from him any articles that may be used in evidence against him. Wharton's Cr. Plead., sec. 60; Roscoe's Cr. Evid., 211; 2 Am. & Eng. Encyc. of Law, 860.

In 25 Am. & Eng. Encyc. of Law, 149, it is laid down that "No distinction is observed between an unauthorized search of the person and one which merely involves an invasion of the citizen's constitutional right to be secure in his house, papers and effects, for none is recognized either by the Federal or State Constitutions, the right to be secure in the lawful possession and enjoyment of property being regarded as no less sacred than the citizen's right to an immunity from an unreasonable search of his person." We may add that the right to be secure in his property is no more sacred than the right to be secure in his person. (And in the cases in which the officer may without a warrant deprive a man of his sacred right to his liberty he may without a warrant deprive him of his no more sacred right of property in the articles that may be used in evidence against him upon the trial for the crime for which he is arrested. His home or his office is not more sacred than his person or his liberty. Such a search and seizure is not, in our opinion, the unreasonable search and seizure which the Fourth Amendment prohibits.)

In *Ganci* v. *United States,* decided in this Court on January 2, 1923, and not yet reported, we held that a search of Ganci's home made without a search warrant was illegal. It is said that that case is decisive of this. But in that case at the time of the entry and search the officers had never seen or heard of Ganci, who had com-

mitted no crime in their presence. They had arrested Lusco for delivering certain narcotics to one Smith in the officers' presence, and they had some reason to believe that Lusco had obtained them at a certain tenement house to which they saw him go, as they thought, to obtain drugs. After arresting Lusco, who did not mention Ganci, the officers visited the tenement house referred to in which there was a number of separate apartments, one of which was occupied by Ganci. Lusco lived elsewhere. The officers visited each floor of the building making inquiries at each apartment, as they descended, and when they reached the first floor they entered Ganci's premises and the room in which he was lying on his bed. They found a box containing narcotics under a couch which they took possession of and then arrested Ganci. Lusco and Ganci were indicted under the Harrison Act and at the trial the narcotics found under the couch were put in evidence. This Court held, Judge HOUGH dissenting, that the evidence was improperly admitted, it having been illegally seized—as the search and seizure had been made without a warrant. In that case the majority of the Court thought that under the circumstances Ganci having committed no crime in the presence of the officers the right to enter and search without a warrant did not exist. It cannot be that upon a suspicion that some one in a hotel or apartment house has unlawful possession of narcotics or liquors the officers can enter without a warrant and examine each guest's room or each tenant's apartment. And even if the officers should obtain a warrant authorizing them to search the hotel or the apartment house generally can it be supposed that such a warrant would be valid and authorize such a search and seizure as was made in the *Ganci* case? That case in its facts is plainly distinguishable from the one at

bar. In this case the defendants were all arrested for a crime committed in the officers' presence including Frank Agnello and it was his apartment which alone was searched and from which the cocaine was taken by the officers.

In *United States* v. *Mitchell*, 274 Fed., 128, 131, a search without warrant had been issued against an apartment house where a number of families resided. The Court referring to it as "an all devouring warrant," declared:

> "This of itself is sufficient to condemn it, as it was never claimed that the whole premises should be searched."

In *Silverthorne Lumber Co.* v. *United States*, 251 U. S., 385, after an arrest of the two Silverthornes at their home, the officers of the Government went to the office of the Silverthorne Lumber Company and took possession of all the books, papers and documents found there and removed them to the office of the District Attorney. This search and removal was not made under the authority of a search warrant. As no crime had been committed in the presence of the officers they had no right to make a search without a warrant. The mere fact of the arrest of a person for a crime not committed in an officer's presence certainly gives no right to search his house or his office without a warrant. That case is not at all decisive of the one now before the Court, as in this case the crime was one committed in the officers' presence of the agents of the Government, who made the arrest and search.

We may refer to a few recent cases in which the courts have upheld the right to search the premises where a crime was committed in the presence of the officers.

In *Herine* v. *United States,* 276 Fed., 806, certain police officers of the City of San Francisco having been informed that the peace and quiet of people were being disturbed by loud and boisterous noise in a certain apartment in that city went to the place and heard the boisterous noises and going to the room found the doors open and saw bottles of intoxicating liquors on the table and glasses. They entered the rooms and found a number of men and women therein, "all of whom were drunk, noisy, boisterous and disturbing the peace." They found there numerous bottles and kegs containing sherry and port wine and the defendant told the officers he was selling the wine for 25 cents per drink. Thereupon they placed the defendant under arrest and took possession of the liquor. The seizure of the liquor under such circumstances, without a warrant, was held by the Circuit Court of Appeals for the Ninth Circuit not to violate the Fourth Amendment.

The same Court in *Vachina* v. *United States,* 283 Fed., 35, held that where a bottle and demijohn containing intoxicating liquor unlawfully in defendant's possession were in plain sight when officers entered a kitchen in the rear of his soft drink barroom, the seizure was legal whether or not they had a valid search warrant. The case went upon the theory that the defendant was engaged, in the presence of the officers, in the actual commission of an offense denounced by the law in that he had possession of intoxicating liquor in his place of business, and that the officers without a warrant might in such a case seize the instrument of the crime.

The same Court in *Kathriner* v. *United States,* 276 Fed., 808, also held a seizure of intoxicating liquor without a warrant not unlawful. In that case the officers entered a soft drink establishment, formerly a saloon,

and found the bartender behind the bar. An officer jumped over the bar and seized liquor found behind the bar. The want of a warrant did not make the seizure unlawful.

In *United States* v. *Holsinger,* 284 Fed., 585, District Judge PECK not only held that prohibition agents were entitled without warrant to seize from a trunk intoxicating liquor which was being unlawfully transported, but also held in a thoughtful and well reasoned opinion that prohibition agents may search a licensed brewery without a warrant, and seize liquor unlawfully manufactured therein, the liquor having an alcoholic content in excess of one-half of one per cent. And a motion to exclude the liquor from evidence was overruled. The justification of the seizure of the liquor from the truck was based upon the theory that an offense against the United States was being committed in the actual presence of the officers in its unlawful transportation. In that case, however, the right to search the brewery without a warrant was based upon certain statutory provisions which conferred upon an inspector of the Internal Revenue Department the right to enter in the day time any building where any objects subject to tax are being made so far as is necessary for the purpose of examining the same, and which invested the agents charged with the enforcement of the Prohibition Act with the powers possessed by the Commissioner of Internal Revenue under Section 3177 of the Revised Statutes.

In *McBride* v. *United States,* 284 Fed., 416, the officers went on the premises without a search warrant and seized a still. They justified their entry and seizure on the ground that they entered the stable after smelling fumes of whiskey then being made in violation of law and that they then seized the property as forfeited to

the United States. The Circuit Court of Appeals for the Fifth Circuit held that when an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence, and that the search and seizure in this case were therefore legal. See *Lambert* v. *United States,* 282 Fed., 413; *Bell* v. *United States,* 285 Fed., 145.

In *People* v. *Cona,* 180 Mich., 641, the defendant was arrested for a murder committed on the street in the presence of an officer. The defendant at the time of his crime fled and was later arrested in his home. At the trial a policeman gave evidence to the effect that he found two revolvers in a sewing machine drawer in the house in which the defendant was arrested. It was claimed that the seizure of the revolvers was in violation of the Federal Constitution, citing *Weeks* v. *United States,* 232 U. S., 383. The Court did not point out in its opinion that the restriction in the Federal Constitution has no application to state officers, although it said that a reading of the opinion of the *Weeks* case made it apparent that the principles which that case laid down were without application to the case then before the Court. The objection raised was disposed of by saying that a reading of the opinion in *Weeks* v. *United States, supra,* "makes it apparent that the principles there announced and relied upon by the defendant are not applicable in the case at bar." The Court sustained the legality of the seizure of the revolvers, citing *Smith* v. *Jerome,* 47 Misc. Rep., 22, 93 N. Y. Supp., 202, quoting therefrom the following passage: "The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for the articles that may be used in evidence to prove the charge on which he is arrested."

Judge GAYNOR in his opinion in the New York case comments on the fact that the authorities on the subject seem to be few, and adds that it is "only because the thing has seldom, if ever, been questioned."

Whether a search or seizure in a criminal case is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. In the instant case we think that what the defendants did in the presence of the agents of the Government was sufficient to justify not only the arrest and search of their persons but also the search of the home of one of them under the circumstances disclosed.

In the case at bar, as we have seen, the persons making the arrest were apprised by what they saw that a crime was being committed in their presence, they made the arrests without a warrant and they made immediate search of the persons they had placed under arrest and thereafter immediate search was made of the room of one of the arrested persons, Frank Agnello, to whose premises Centerino, one of the defendants, had gone a short time before after telling one of the Government's agents that he did not have the cocaine but would have to go and get it. Centerino in about five minutes came out of Agnello's premises, at No. 167 Columbia Street, accompanied by the two Agnellos and Pace. They went directly to Alba's house, Alba having remained there. The agents looking through the window in Alba's house saw all the defendants sitting around the table and upon it the packages of cocaine. The arrests followed and then the search of the persons arrested and the search of Frank Agnello's premises, where they found and took possession of the can of cocaine which was offered in evidence. The agents had such direct and personal knowledge as justified the search of the premises of Agnello—as fully as it did the search of his person.

Before concluding this opinion we may call attention to the fact that United States Marshals and their deputies have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in each State have by law in executing the laws thereof. U. S. Rev. St., Sec. 788. The statute invests the marshal and his deputies in his district with all the powers, common law and statutory, which a sheriff and his deputies have in the State in which his district lies. *Carico* v. *Wilmore*, 51 Fed., 196, 199.

The Code of Criminal Procedure of the State of New York (1907), Section 177, provides that a peace officer may, without a warrant, arrest a person:

> 1. For a crime committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has in fact been committed and he has reasonable cause for believing the person to be arrested to have committed it.

These provisions are in accord with the rule at common law. See *People ex rel. Kingsley*, 22 Hun (N. Y.), 300, 301.

The same Code in Section 183 also provides that a private person may arrest another in the following cases:

> 1. For a crime committed or attempted in his presence;
>
> 2. When the person arrested has committed a felony, although not in his presence.

And this appears to have been the law of New York irrespective of statute. See *Holley* v. *Mix*, 3 Wend., 353 (1829).

The defendants herein were not, however, arrested by the United States Marshal or any of his deputies. The persons by whom they were placed under arrest and who searched the premises of the defendant, Frank Agnello, and took possession of the can of cocaine, seem to have been agents of the Commissioner of Internal Revenue, and as such we are not aware that they possess any special authority to make arrests. But a private person under the common law has a right, and it is his duty to make an arrest without a warrant in certain cases. A private person has the same right as an officer to arrest without a warrant if a felony is committed in his presence. *Rex* v. *Howarth*, 1 Moody c. c., 207; *People* v. *Governale*, 193 N. Y., 581; *Brooks* v. *Commonwealth*, 61 Pa., 352; *State* v. *Mowry*, 37 Kans., 369; *Kennedy* v. *State*, 107 Ind., 144; *Kercheval* v. *State*, 46 Ind., 120. And in the cases in which a private person can arrest without a warrant, he is entitled to make a search of his person and of his premises also without a warrant. As a private person has the same power as a peace officer to make an arrest, if the crime has been actually committed in his presence, and it is not disputed that in the case at bar the crime was committed in the presence of those who made the arrest, the cases to which we have referred in the course of this opinion sustaining the right of a peace officer to arrest and search without a warrant where the crime is committed in the presence of the officer are, of course, applicable to the facts of this case, although the persons making the arrest and search may have in such matters no greater rights than those possessed by any other private citizen in whose presence a crime is committed.

Judgment affirmed.

Concurring Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

Before: ROGERS, HOUGH and MANTON, *Circuit Judges.*

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE,
Plaintiffs-in-error
(*Defendants below*),

against

THE UNITED STATES OF AMERICA,
Defendants-in-error
(*Plaintiffs below*).

HOUGH, *C. J.* (concurring);

In result I agree with Judge ROGERS, but cannot follow the reasoning by which result is reached.

The constitutional rule is simple in form, and single in statement, there are no sub-heads and no exceptions. That the right of the people to be secure in their houses and effects against unreasonable searches and seizure shall not be violated, is the rule.

As the expression of one excludes the other—there is no right in the people to be secure from reasonable searches and seizures. Consequently the only question in every case is whether under the evidence there was unreasonable action.

Unreasonableness is matter of fact, although it is also one of those fact questions which, because it has

been decided by generations of judges instead of being left to juries, is commonly denominated a question of law.

To say that a man may be searched after arrest, though not before; or that a place or house may be searched when a crime is there seen to be committed, and not otherwise, is to introduce false standards; the question always remains—Was the search or seizure unreasonable? The arrest is no more than evidence, that suspicion had come near enough to certainty to make both arrest and search reasonable. If it appeared, however, that the arrest was only for the purpose of search, the evidence would be overwhelming that the whole procedure was unreasonable, unconstitutional and actionable.

To say that a crime was seen to be committed, is but saying that the observer became a competent witness in proving criminal act and intent. Undoubtedly the phrase has been used so long that it has acquired a technical meaning, *to wit*, acquisition by the peace officer, through one of his senses, of knowledge of facts which in a reasonable man induce belief that crime has been committed.

An officer who hears an explosion as of firearms in a residence and at once sees a man leave the building; one who smells liquor in a house and sees the proprietor, or who by any sense becomes aware of phenomena reasonably suggestive of the proximity of crime and a criminal, may arrest and search; that it finally appears that no crime was committed, may not and usually does not render either arrest or search unreasonable.

In the present case the matters seen and heard by the officers, were most persuasive of crime committed; arrests were fully warranted and so was search, not only of the place or house in which defendants met, but of any other place reasonably indicated by surrounding

circumstances as containing incriminating matters. No. 167 Columbia Street was emphatically such a place; incriminating evidence was there discovered; and since it was the result of a reasonable search and seizure, it was properly admitted in evidence.

The foregoing train of thought led to my dissent with the *Ganci* case. The more that proceeding is examined, the more it resembles this in every essential particular. In each a probable, almost certain criminal was seen to leave a certain house, in each the criminal transfer or sale was watched, in each the house left by the criminal was searched and in each incriminating evidence of the crime observed was found. The only difference is that the Ganci search revealed an additional criminal, who naturally complained about it. But the difference is immaterial. Consequently I am unable to differentiate between that case and this, when the single question is as to reasonableness.

Supreme Court of the United States.

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE, *Petitioners,*

against

THE UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioners were convicted under an indictment in the United States District Court for the Eastern District of New York, which charged them with the crime of conspiracy to commit the offense of selling heroin and cocaine without having registered or paid the tax prescribed, and in violation of the Harrison Act. Each defendant was sentenced to be imprisoned for a term of two years at Atlanta Penitentiary and to pay a fine of Five Thousand Dollars ($5,000).

Writ of error was taken to the United States Circuit Court of Appeals for the Second Circuit. In that court the following three questions were presented.

1. The Court erred in admitting evidence obtained by unlawful search and seizure.

2. The indictment did not state facts sufficient to constitute a crime.

3. The Court erred in refusing to require the witness Dispenza to testify truthfully as to his address.

The opinion of the Circuit Court of Appeals discusses only the first question. The opinion reads in part as follows:

> "It is claimed that the testimony that a can of cocaine hydrochloride was found in the room of Frank Agnello was improperly admitted in evidence since it was obtained through an unlawful search. And this is the important question in the case."
>
> * * * * * * * * *
>
> "The question thus raised is one of great importance. May an agent of the Government in a case where he can arrest without a warrant and search the person without a warrant, search also without a warrant the home of the person so arrested? Is such a search and seizure to be regarded as such an 'unreasonable' search and seizure as violated the constitutional rights of Frank Agnello? If it constituted such a violation we must consider whether the property so seized was improperly received in evidence."
>
> * * * * * * * * *
>
> "And in the cases in which the officer may without a warrant deprive a man of his sacred right to his liberty he may without a warrant deprive him of his no more sacred right of property in the articles that may be used in evidence against him upon the trial for the crime for which he is arrested. His home or his office is not more sacred than his person or his liberty. Such a search and seizure is not, in our opinion, the unreasonable search and seizure which the Fourth Amendment prohibits."

In the case of *Ganci* v. *United States*, decided in the Circuit Court of Appeals for the Second Circuit on January 2, 1923, it was held that a search of Ganci's home made without a search warrant was illegal. Judge

HOUGH dissented in the *Ganci* case, and in this case, in his concurring opinion he states:

> "The foregoing train of thought led to my dissent with the *Ganci* case. The more that proceeding is examined, the more it resembles this in every essential particular."

Judge MAYER wrote the prevailing opinion in the *Ganci* case. Judge HOUGH dissented. Judge ROGERS wrote the prevailing opinion in the present case. Judge HOUGH concurs, but dissents from the reasoning of that opinion. It is thus apparent that the question is one of considerable doubt. And it is emphasized in the opinion of Judge ROGERS in this case that the question is one of great importance. It involves constitutional rights. It is a question that will arise with extreme frequency, in connection with prosecutions under the National Prohibition Act, under the Harrison Act and other similar acts. The view taken by the Court in this case is a radical departure from the well established principles enunciated time and again by the Supreme Court. The fact that this is a departure from the principles laid down by the Supreme Court is clearly recognized by Judge HOUGH in his dissenting opinion in the *Ganci* case.

The Judges of the Circuit Court of Appeals have been led by the conditions of good order that prevail in New York to offer a progressive interpretation of the constitutional safeguards contained in the Fourth and Fifth Amendments. Not alone is this not justified in law, but in fact, these provisions must be construed with reference to the conditions existing throughout the country and not alone in the City or State of New York. And until these amendments are removed from the constitution or modified, it must be accepted with finality that the conditions prevailing throughout the United States do

not justify any relaxation of the principles of these amendments. The Circuit Court of Appeals, sitting in New York, may be impressed with the necessity of removing "by controlling authority this final manacle which has been put on crime prevention" (Opinion of Judge HOUGH in *Ganci* case). But the country at large is more concerned that the rights of the people shall be secured against the inroads and encroachments of unrestrained executive authorities. The vast increase of these executive authorities in recent years, with the vast increase in their functions and activities, make more necessary the preservation of the liberties guaranteed by the Constitutional Amendments.

The principle announced by the Circuit Court of Appeals in this case is an extraordinary departure from prevailing decisions. It is justified by reasoning, which is not alone utterly insufficient, but is subversive of the result reached.

The reasoning of the Circuit Court of Appeals is as follows:

An arrest in this case was made without a warrant by agents of the Commissioner of Internal Revenue. As such they do not possess any special authority to make arrests. A private person has the same right as a peace officer to arrest without a warrant if a felony is committed in his presence. In this case the opinion states that the felony, to wit, the conspiracy, was committed in the presence of the revenue agents.

If the felony is committed in the presence of the revenue agents, who concededly have only the capacity of private persons, and if an arrest is thereupon made without warrant, it is the right of these private persons, acting under the guise of the authority vested in them as officers or agents of the United States, to search the

homes of the offenders, although these homes may be places far apart from the scene of the actual commission of the felony.

And if in such a search, there is obtained any *evidence* of the commission of the felony this evidence may be offered and received upon the trial to establish the essential preliminary and fundamental fact, which alone in the opinion of the Court justifies the search—the actual commission of a felony in the presence of the revenue agents.

To justify the search, a felony must have been committed in the presence of the officers. To establish that the felony was committed, the fruits of the search may be offered in evidence. The legal insufficiency and inaccuracy of this reasoning is apparent. And it is pointed out with emphasis by Judge HOUGH in his concurring opinion. He says:

> "To say that a man may be searched after arrest, though not before; or that a place or house may be searched when a crime is there seen to be committed, and not otherwise, is to introduce false standards; the question always remains—Was the search or seizure unreasonable? The arrest is no more than evidence, that suspicion had come near enough to certainty to make both arrest and search reasonable. If it appeared, however, that the arrest was only for the purpose of search, the evidence would be overwhelming, that the whole procedure was unreasonable, unconstitutional and actionable."

Judge HOUGH is correct in this criticism of the concurring opinion. If the reasonableness of the search is to be determined by the reasonableness of the arrest, then that which was obtained in the search cannot be used to support the right to arrest. The only logical basis for

justifying a search is that the person making the arrest had reasonable ground to believe that a felony was being committed.

And Judge HOUGH contends for this standard.

But if the reasonable suspicion of the revenue agents that a crime has been committed justifies a search, then a search may be made without arrest. And the reasonableness of the search does not in the least depend upon whether or not a crime actually was committed, but whether or not the revenue agents were justified in their suspicions. As Judge HOUGH says:

> "That it finally appears that no crime was committed, may not and usually does not render either arrest or search unreasonable."

So that we have this extraordinary situation,—that the reasonable suspicion of a private person is to take the place of the constitutional requirement that search of a person's home may be had only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." The reasonable suspicion takes the place of the warrant. And who determines whether there was reasonable suspicion, so as to justify the admission in evidence of the things seized? Manifestly it must be determined as a matter of law by the Court. And if upon the facts presented the Court deems that the revenue agent was reasonably suspicious that a crime was being committed, then the thing seized may be received in evidence, the warrant required as a condition of search of private homes, the complaint describing the place to be searched or the thing to be seized, is replaced by the determination of the Court made long after the event. And what will so much govern and control this

determination as the result of the search? If the search disclosed matters which may be evidence of a crime, then, of course, the person was justified in his suspicion, and in making the search. So that we have thousands of revenue agents endowed with the right to search at will the homes of private citizens, subject only to the condition that they shall be successful in finding some evidence of the commission of a crime.

And all this is to be taken in connection with the fact that most revenue offenses are declared to be misdemeanors by statute, but by artifice on the part of prosecuting attorneys may be sublimated into felonies.

The Harrison Act does not, and cannot without violation of the reserved police powers of the State, make mere possession of heroin and cocaine an offense, for Section 1 of the Act provides that every person "who imports, manufactures, produces, compounds, sells, deals in, dispenses or gives away opium or cocoa leaves," etc., shall register with the Collector of Internal Revenue. No tax is imposed upon the *possession* of heroin or cocaine. The seizure of the can of cocaine cannot therefore be justified as the seizure of property forfeited to the United States.

Citation of many authorities in support of the proposition that the rule adopted by the Circuit Court of Appeals in this case is entirely unjustified by the previous decisions of this Court is unnecessary. It is sufficient to refer to the recent cases of *Gouled* v. *United States,* 255 U. S., 298, and *Amos* v. *United States,* 255 U. S., 313.

> "The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things

> to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the *Boyd* and *Weeks* cases, *supra*, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeited coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized under search warrants lawfully applied for, issued and executed."

Gouled v. *United States*, 255 U. S., at p. 308.

It thus appears that the instances in which property may be searched for under search warrants issued upon probable cause, supported by oath or affirmation, are limited to certain classes. These classes were recognized in the law at the time the constitutional amendment was adopted. The Supreme Court has shown no tendency whatever to extend the classes of cases in which search warrants may be issued. There is no authority in law for the issuance of a search warrant to discover the possession of heroin or cocaine.

But never has this Court recognized in the remotest way the right to search without warrant premises upon which no crime was committed.

If a search of a man's home, without warrant, is to be permitted in cases where revenue agents are suspicious that a crime has been committed, if such searches are justified in law, if the revenue agent is authorized to enter, search and seize, then it follows that whatever is so obtained may be used in evidence. And it may be used in evidence not alone in support of the offense concerning which the revenue agent had his suspicions, but in support of any offense whatsoever. Once the search is justified, there is no restriction upon the use as evidence of the property seized. If there is "no reason why property seized under a valid search warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him" (*Gouled* case at p. 311), then it necessarily follows that property seized under an authorized search, although made without warrant, may be so used.

If revenue agents, having suspicion which the Court upon the trial deems justified, that a felony has been committed, are authorized to make search for evidence of that crime, then what is there to prevent agents of the Treasury Department, who have suspicion that a taxpayer has made false oath in the return of his income taxes, entering the home or office of the taxpayer and seizing all his books and papers? And if upon the trial these books and papers support the suspicion of the revenue agent, the Court must deem that the suspicion was well founded, and will permit the books and papers to be received in evidence.

With reference to the second point urged in the Circuit Court of Appeals, it is not necessary to do more

than call the attention of the Court to the point presented. A substantive offense under the Harrison Act must involve a sale within some revenue district of the United States. For it makes it an offense to sell only in case the person selling has not registered with the Collector of Internal Revenue of the district where the business is to be carried on. A conspiracy to commit this offense must be a conspiracy to sell at some place within the United States. In a charge of conspiracy it is not, of course, necessary to mention the particular place, since the conspirators may not have themselves definitely agreed upon the place. But it is certainly necessary that the charge shall be a conspiracy to sell within the United States.

With reference to the third point presented the attention of the Court is called to the proceedings as they appear in the bill of exceptions at folio 1391. The testimony of this witness is the only testimony in the case that directly implicates the defendants, Thomas Agnello, Frank Agnello and Pace. He was a hired informer. He gave untruthful testimony as to his address. The Court sustained him in his refusal to give his correct address. This refusal was accompanied by the utterly unjustified statement of the prosecuting attorney: "I don't want this man's wife and child murdered" (fol. 1391). The Court had to be importuned more than once before there was finally obtained a feeble condemnation of this statement of the prosecuting attorney.

For the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted.

The constitutional question involved is one as to which there has been considerable doubt and difference in the Circuit Court of Appeals for the Second Circuit. It is a

situation which will arise with the greatest frequency. If the decision in this case is allowed to prevail, it will amount to an actual repudiation of the previous decisions of this Court, and will be a complete annihilation of the safeguard of the Fourth and Fifth Amendments.

All of which is respectfully submitted.

GEORGE GORDON BATTLE,
Counsel for Petitioners,
37 Wall Street,
Borough of Manhattan,
New York City.

Reported N. Y. Law Journal, Jan. 16, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

Before: ROGERS, HOUGH and MAYER, *Circuit Judges.*

GIUSEPPE GANCI,

Plaintiff-in-error,

against

UNITED STATES OF AMERICA,

Defendant-in-error.

MAYER, *Circuit Judge.*—Ganci and one Emanuel Lusco were jointly indicted under Sections 1, 2 and 8 of the so-called Harrison Act of December 17, 1914, as amended by the Act of February 24, 1919.

The indictment contained six counts. Eliminating indictment language, the charges of the respective counts may be summarized as follows: (1) that defendants sold a quantity of heroin without having registered with the collector of internal revenue and without having paid the tax as provided by law; (2) that defendants sold the heroin without an order therefor upon a form issued by the collector of internal revenue; (3) that defendants sold a quantity of cocaine without having registered and without having paid the tax; (4) that defendants sold and delivered the cocaine without the production and delivery of an order form; (5) that from June 1, 1921, to and including November 3, 1921, defendants "were then and there dealing in" opium, morphine, heroin and cocaine "and so were persons required to register

and pay the special tax as required by" the Act of December 17, 1914, as amended, and that defendants had not registered and had not paid the tax; (6) that from June 1, 1921, to and including November 3, 1921, defendants had unlawfully in their possession heroin, morphine and cocaine without having registered and without having paid the special tax.

Lusco was convicted under all six counts. Ganci was acquitted on Counts 1, 2, 3 and 4 and convicted under Counts 5 and 6. The fifth and sixth counts were laid respectively under Sections 1 and 8 of the act. The pertinent parts of these sections are quoted in the margin.

To establish the offenses charged the government called three witnesses.

Joseph Smith testified that he was a peddler of narcotics and that about 3 o'clock on the afternoon of November 3, 1921, he was arrested by Manning and Pacetta, agents of the so-called Narcotic Squad of the Internal Revenue Department. Smith said to Manning: "Why take me, I am only a little fellow; why don't you get a big fellow? I will give you a big connection if you turn around and give me money to go and buy the stuff." The "big fellow" was defendant Lusco, from whom, as Smith testified, he had been buying narcotics for seven months twice a week. A plan for the detection of Lusco was then arranged. Smith informed the officers that his former purchases from Lusco usually amounted to about $80—$60 for heroin and $20 for cocaine. Manning gave Smith $80 in marked bills and the usual protection of searching Smith was taken, so that Smith would have no narcotics on his person and no money except the marked bills. Lusco lived at No. 124 Seventh avenue, which was at about Nineteenth street. The office of the Narcotic Squad was at Twenty-seventh street, and Smith left

there to proceed to Lusco's home with the officers closely following Smith. Smith went into Lusco's apartment and found him in bed, and, according to Smith's testimony, he told Lusco that he needed some narcotics at once, whereupon Lusco started to dress himself and asked Smith how much he wanted. To this Smith answered that he wanted 100 grams—a package of H. and C. (H. for heroin and C. for cocaine); but Lusco told Smith that he did not have any C., but that he had H., and Smith stated that he would take the H. Lusco told Smith to meet him downstairs. Smith thereupon went downstairs and went into a baker's shop, and after he came out Lusco's wife approaced Smith and called him upstairs. When Smith went upstairs on this second occasion Lusco showed him a very small quantity of cocaine, for which Smith gave Lusco $4 and Lusco then told Smith that the latter had better give him the money for the heroin. Thereupon Smith gave Lusco $60 for the heroin. Smith again went downstairs, and in about ten minutes was joined by Lusco. These two proceeded through Eighteenth street to Eighth avenue, got on an Eighth avenue car and went up to Thirty-fifth street and Eighth avenue. They then walked west until they reached an opera house building between Eighth and Ninth avenues, when Lusco told Smith to wait until he came back. In about half an hour, according to Smith, Lusco returned with a package of heroin.

Manning had followed Lusco to the premises No. 419 West Thirty-fifth street, and these were the premises which Lusco entered and in which he remained, according to Manning, for about ten or fifteen minutes. After Lusco came out of these premises Manning followed him to the point where Lusco met Smith, saw Lusco hand Smith a newspaper, saw Smith put this in his pocket,

thereupon arrested Smith and took the package from him, and Pacetta, another government agent, also then arrested Lusco. The package contained heroin. The testimony of Pacetta accorded substantially with that of Manning in respect of the matters set forth (*supra*).

Both Smith and Lusco were taken to the police station at Thirtieth street and then Manning went back to his office and was joined by several other government agents. Manning then went with his associates to No. 419 West Thirty-fifth street.

It will be noted that up to this time no information of any kind had been given as to Ganci. Smith had said nothing to the officers concerning Ganci.

On the trial Smith testified that when he visited Lusco on occasions prior to November 3 he had sometimes seen Ganci present, but had never had any conversations with him. Even this information as to seeing Ganci with Lusco was not communicated by Smith to the officers. The most that can be said is that the officers had reasonable ground to believe that Lusco had obtained the narcotics from some person or place in No. 419 West Thirty-fifth street.

Ganci had conducted a barber shop at No. 419 West Thirty-fifth street for sixteen years and lived in four rooms in the rear of the shop with his wife and six children. The first room was the dining room, the second the bedroom of Ganci and a son, the third the kitchen and the fourth the bedroom of his wife and his other children.

After Manning and his associates arrived at 419 West Thirty-fifth street he went all through the house, which apparently was a tenement dwelling. He did not go into the barber shop first. His search may best be described in his own words: "I went to the top floor of

the building first and inquired for Emanuel Lusco. I did not search that apartment. Then I went down to the next floor and there I inquired for Emanuel Lusco, and they told me there they didn't know him. I did not search that apartment. I don't remember whether there were Italian people living on the top floor or on the next to the top floor. Then I went on the next floor below that and made the same inquiry there. We intended to search that apartment, but we did not. I looked under the sink, pulled the curtains from the sink, the man looked to be all right, and I said 'All right.' That is the only place I looked, under the sink. I didn't expect to find narcotics under the sink. I just looked for them. Then we went down to the candy store. We did not search that place. * * * I had each floor watched, yes. I didn't know Ganci before this, never saw him in my life; never heard of him. * * * I was looking for anybody selling dope. I may have been looking for Ganci. I didn't know him, neither by name nor by sight, before this day. When I got back there the last place I visited was the barber shop, that is right. When I got into the barber shop, there was nobody there in the barber shop and I went through the house."

In the second room back of the barber shop Manning found Ganci lying on the bed. Ganci was "the first Italian" Manning found in the building. "The minute you got in there," he was asked, "you grabbed him and said to him where is the stuff?" to which Manning answered, "That is the fact." Ganci said that he did not have the "stuff" and that he did not know what Manning wanted. Thereupon, Manning began to search, and underneath the sofa he found a box or package. This box or package contained narcotics and the box and contents were marked as exhibits. Thereafter, according to Manning,

Ganci said he had been selling this "stuff" for about a year.

Manning further testified that he told Ganci that the officers intended to search the place thoroughly and that he would tear down the pictures off the wall and everything else unless "he gave me all the stuff that was there." Ganci said that the only thing he had left was some waxpaper boxes and some bottles. These Ganci produced.

Pacetta was present throughout this entry into and search of Ganci's premises and substantially corroborated the testimony of Manning.

The box found by the officers and the contents thereof made a formidable array of exhibits as follows: Exhibit 4, box; Exhibit 5, a number of small packages of heroin; Exhibit 6, a set of weighing scales; Exhibit 7, three 100-gram packages of heroin; Exhibit 8, two packages of morphine sulphate; Exhibit 9, a can of heroin in powdered form. After these exhibits were marked in evidence the prosecuting attorney stated, "And here are some more packages of cocaine and heroin. I will offer the rest, gentlemen, all the little bottles, about four dozen empty jars."

Ganci took the stand, testified that he had been in the United States for thirty-two years, had never been charged with any crime, and, as stated (*supra*), had conducted the barber shop for sixteen years and lived in the rear thereof with his wife and children. He denied knowing Lusco and gave an explanation of the presence of the box and contents, which, if believed, was consistent with innocence. At the time the exhibits were offered and received in evidence no objection nor appropriate motion to exclude was made, but at the conclusion of Ganci's testimony his counsel moved "to strike out the

testimony of the officer that was given with relation to taking a box out of Ganci's place, on the ground that it appears from their evidence and from their testimony that they had no warrant of seizure; that they went into his place of business, to his home, without any warrant of seizure, and that they took out of his place a box which they claim is a box which they produce here now, which is illegal evidence and has no place here."

This motion was denied and exception duly taken. As Lusco and Ganci were tried together, counsel for Lusco then called Lusco's wife and then Lusco, who was the last witness.

In view of the verdict of the jury and the fact that we find no errors, except as set forth (*infra*) recitation of further details is unnecessary. The verdict of not guilty in favor of Ganci in respect of Counts 1, 2, 3 and 4 was tantamount to a finding that Ganci had not engaged in any direct sale. In view of the complete absence of any other evidence implicating Ganci proof of the possession of the narcotics was vital to conviction under the fifth and sixth counts, for Section 8 makes possession by a person not registered and who has not paid the special tax presumptive evidence of a violation of Sections 1 and 8.

The assignments and amended assignments of error bring up the question as to whether Ganci's rights under the Fourth and Fifth Amendments were violated.

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Admittedly, there was no search warrant, but the question here considered can be well tested by applying the provisions as to a search warrant. Could Manning or Pacetta have *particularly* described the place to be searched and the person or things to be seized? Obviously not. All they could have presented by oath or affirmation upon an application for a search warrant was that they suspected that somewhere in a building having many apartments there might be some narcotics. They had ground to believe that Lusco obtained his narcotics from somebody in the building, but their conduct in visiting various apartments and finally visiting Ganci, who was the "first Italian that * * *" Manning "found in the building" perfectly shows that they were on a roving expedition with no knowledge or even suspicion to justify their entrance into a particular person's home. The officers had never heard of Ganci; they had seen Lusco enter this tenement building, but they had not seen Lusco enter or leave Ganci's barber shop or living rooms, and, in brief, they had not even the slightest information upon which to predicate "probable cause."

It is, of course, true that in certain circumstances a search warrant is not necessary, and also that the Fourth Amendment does not safeguard against any search or seizure, but only against "unreasonable" searches and seizures.

An illustration of a search which was not unreasonable is found in the recent case of *Lambert* v. *United States* (282 F. R., 413), a case wholly different from that at bar, because of Lambert's actions made known to the officers prior to search and seizure. The law is succinctly stated at the conclusion of the opinion as follows: "What is prohibited by the Fourth Amendment of the constitution, as will be seen from the foregoing, is the unreasonable search or seizure of the person, home, pa-

pers, or effects of any of the people of this country without a warrant issued upon reasonable cause, supported by oath or affirmation particularly describing the place to be searched and the person or thing to be seized. It is not claimed that either of the officers who made the search and seizure here involved acted by virtue of any warrant, or that they made any attempt to procure a warrant upon the information conveyed to them by Edison. Under the circumstances of the case, was that essential?

The prohibition of the Fourth Amendment is against all *unreasonable* searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined *according to the facts and circumstances of the particular case.* We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the national Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant." (Italics ours.)

There was nothing in the case at bar to "reasonably lead" Manning and Pacetta to believe that Ganci was "actually engaged in a criminal act." If the acts of the officers in entering and searching Ganci's home can be legally justified, no man would be safe from the un-

reasonable search which the Fourth Amendment denounces.

The Fourth and Fifth Amendments have been so recently considered by the Supreme Court that we need not pause to discuss the previous leading cases (*Gouled* v. *United States*, 255 U. S., 298; *Amos* v. *United States*, 255 U. S., 313).

The fact that Manning and Pacetta did not use force in entering Ganci's premises adds nothing to the government's case (*Gouled* v. *United States, supra; Amos* v. *United States, supra*).

It is urged, however, that because the narcotics were the instruments of the crime their seizure was lawful and the testimony was therefore admissible. It is not, however, unlawful merely to possess narcotics.

The illegal act (among others) consists in possessing *without registration and payment of tax*, and possession of narcotics is merely presumptive evidence of a violation of the statute. The case is quite different from *United States* v. *Welsh* (247 F. R., 239; 267 F. R., 819). If, however, upon the facts of this case there were any doubt that the seized narcotics were not admissible in evidence against Ganci it is disposed of by the *Amos* case (*supra*), where the Court held that it was error to receive in evidence the "illictly distilled" whiskey because of the illegal search and seizure.

We must not be tempted to avoid the preservation of constitutional safeguards because of the nature of the crime charged nor because of difficulties in detecting crime. We realize the insidious and dangerous character of the narcotics concerned in this case and appreciate the skill necessary to discover the traffickers. The Supreme Court, however, has never permitted the obnoxious nature of a crime nor the difficulties of detection to dim its view as to the necessity of preserving at any cost

our hard-won constitutional safeguards, and it may be tritely observed that a stern adherence to that preservation makes both for liberty and order in the long run.

Finally, it is suggested that the motion to strike out came too late.

Whatever at one time may have been the view as to what constituted a seasonable application to require the government to return seized property or as to what should be regarded as a timely objection, there can now be no doubt that at any time prior to verdict a motion such as was here made must be entertained. In the *Gouled* case the Supreme Court said: "It is plain that the trial Court acted upon the rule widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet after all it is only a rule of procedure and therefore it is not to be applied as a hard and fast formula to every case regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers it is the duty of the trial Court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right" (see also the *Amos* case).

In any event this Court will "in the exercise of a sound discretion sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception" (*Crawford* v. *United States*, 212 U. S., at p. 194), while, on the

other hand, the Court will disregard mere technical errors, "which do not affect the substantial rights of the parties" (Act of February 26, 1919, being chap. 48, amending sec. 269 of the Judicial Code).

As the search and seizure were illegal the motion to strike out the testimony relating thereto should have been granted, and failure so to do was reversible error.

Judgment reversed.

HOUGH, *C. J.* (dissenting).—This case raises acutely the question, What is an *unreasonable* search?

The recent *Lambert* decision (*supra*) sufficiently and directly shows that the question exists and is insistent. Its importance cannot be exaggerated, for Congress and Legislatures continually increase the output of statutes intimately regulating private conduct, and making crimes out of indulgence in sensual gratification, which in former yet recent days were left by municipal law to punish their own victims by the physical and moral damnation they admittedly produce. When some men are willing to pay sufficiently high prices for unlawful gratification of desire, other men will, of course, make a business of pandering to those vices, and such procurers are equally, of course, *professional* criminals—a class not engendered by the simple though severe criminal codes known when the constitution of this country was drafted.

When the mere possession of specified articles of commerce becomes *per se* criminal, the detection and suppression of crime becomes largely discovery and proof of possession; while the criminal invokes the law he professionally violates by using the citizen's castle, *i.e.*, his home, as the place of possession and the means of criminality. To harmonize the voice of a large class of twentieth century statutes with the voice of an eighteenth century constitution is indeed difficult.

Again, the *Lambert* case (*supra*) shows indirectly and by the absence of citation the novelty of the question.

The classic comment on the Fourth Amendment, viz., that it is a restatement of the common law maxim which "secures to the citizen immunity in his home against the prying eyes of the government," except in a "few specified cases" (Cooley Const. Limit, 7th ed., p. 425), does not get one very far until the "specified cases" are deliminated with particularity. When it is remembered that Cooley, and all other nineteenth century commentators, identify this protection of home with protection "in person, property and papers," it is difficult to reconcile such *dicta* with the proposition (well supported by decisions) that one in custody on a criminal charge "may be subjected to personal search and examination even against his will for evidence of criminality, and such evidence may be constitutionally seized" (35 Cyc., 1271).

The gist of the decisions is that such search and seizure is reasonable, which means that courts having considered the facts decree as law on these facts—such reasonableness.

This is no more than has always been done by courts in passing on what is *e.g.*, a *reasonable* time or the like (*First National Bank* v. *Pipe, &c., Co.*, 273 Fed., 105).

If the same or a similar course is pursued here, it seems to me that a more reasonable search cannot be imagined.

The officers of the law saw Lusco deliver unlawful drugs to Smith; they learned from the latter that Lusco was going after a further supply; they saw him go into a tenement and emerge with the supply. It was an irresistible inference that there was a supply in that tenement, and a most natural and probable one that if there

was another Italian in said tenement he had the supply, *i.e.*, the very crime.

They entered the tenement, and the only Italian there was Ganci; they looked under the sofa and found the crime. The entrance was through a barber shop, a public place; there was no breaking, violence or deception.

To me this proceeding was perfectly reasonable; far more so than the spirit of apparent divination that guided the law officers to the recesses of Lambert's motor (*supra*).

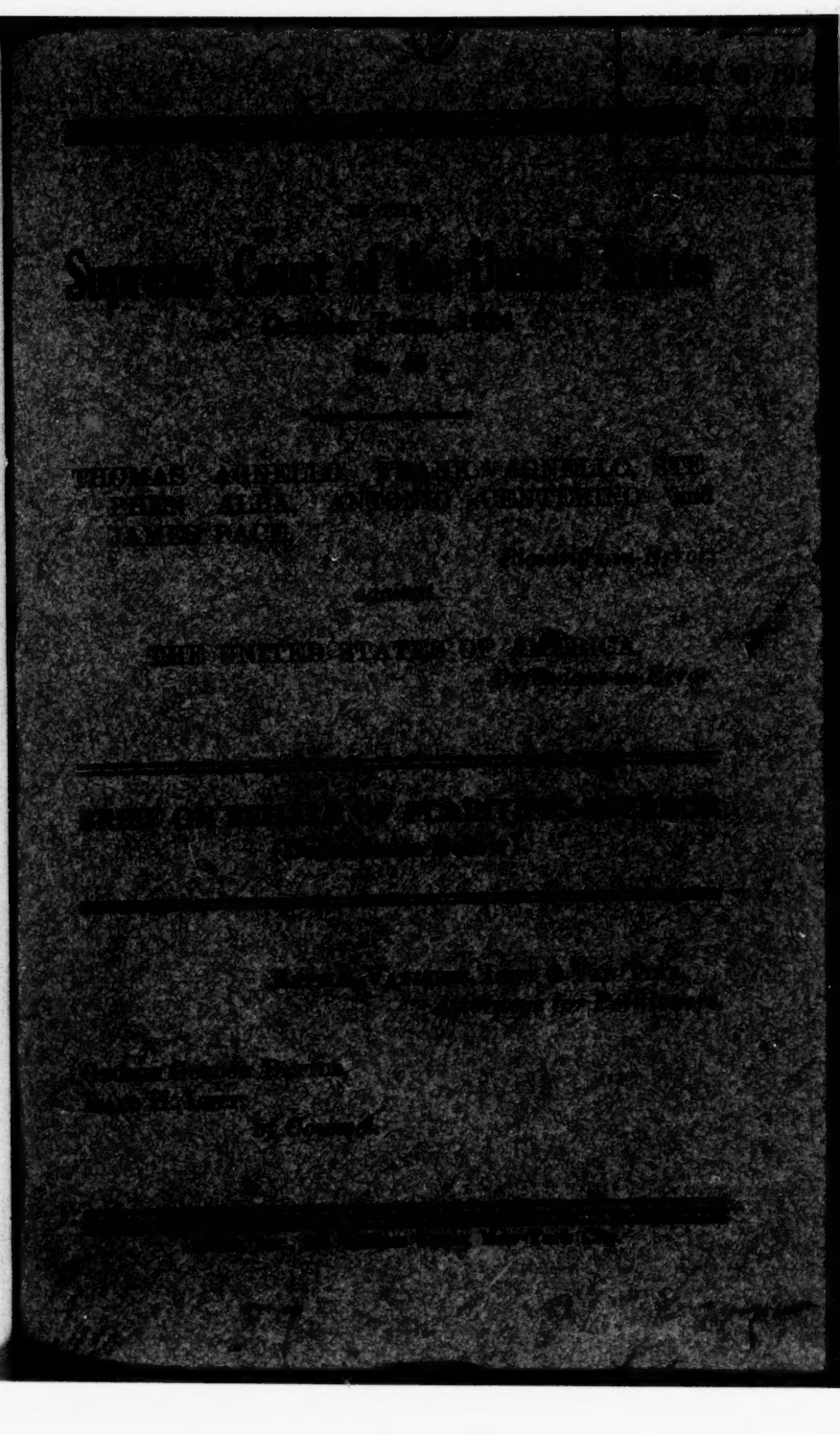
"Reasonable" means no more than "agreeable to reason," and reason is but "that intellectual power by which we are enabled to combine means for the attainment of particular ends" (Bouvier Law Dict.).

When applied to searches and seizures it seems to me quite plain that "reasonable" should have the same signification as when used in other constitutional connections, of which it has been said that "the scope of the term as regards any situation must be measured, having regard to the fundamental principles of human liberty as they were understood at the time of the formation of the constitution" (*Bonnett* v. *Vallier*, 136 Wis., 193, 203).

If one considers these facts in this way it seems almost humorous to suppose that any eighteenth century bailiff would not have done what these officers did, or to suggest that any eighteenth century criminal would have thought his rights invaded.

Indeed, if officers literally in hot pursuit of a crime, *i.e.*, of unlawfully possessed drugs, some of which had been sold under their very noses a few minutes before, may not search and seize before (*e.g.*,) a douche of water destroys both crime and evidence, there is no such thing as a reasonable search except by warrant.

Perhaps so, but the amendment does not so declare and until by controlling authority this final manacle has been put on crime prevention I dissent.



INDEX

Table of Cases.

IN THE

Supreme Court of the United States

THOMAS AGNELLO, FRANK AGNELLO, STEPHEN ALBA, ANTONIO CENTERINO and JAMES PACE,

Plaintiffs-in-Error,

against

THE UNITED STATES OF AMERICA,

Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR (Defendants Below).

This cause comes here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. The United States joined with the petitioners in requesting that the writ be issued, in order that the question of search and seizure be decided by this Court to the end that there may be uniformity of action on the part of Government officers in the enforcement of the so-called Anti-Narcotic Statute throughout the country.

The opinion of Judge ROGERS states the question involved in this case as follows:

> "May an agent of the Government in a case where he can arrest without a warrant and search the person without a warrant, search also without a warrant the home of the person so arrested?" (fol. 792).

The opinion of Judge HOUGH states the question as follows:

> "To say that a man may be searched after arrest, though not before; or that a place or house may be searched when a crime is there seen to be committed, and not otherwise, is to introduce false standards; the question always remains, was the search or seizure unreasonable?" (fol. 818).

And the conclusion is arrived at that the search was fully warranted

> "not only of the place or house in which defendants met but of any other place reasonably indicated by surrounding circumstances as containing incriminating matter."

The defendants were convicted in the Eastern District of New York on the first count of an indictment which charged a conspiracy under Section 37 of the Criminal Code to violate the Act of December 17, 1914, commonly known as the Harrison Act. The indictment charged that the defendants conspired "to sell a large quantity of heroin, which is a derivative of opium, and cocaine, which is a derivative of cocoa leaves, without having first registered with the Collector of Internal Revenue" (fol. 7).

The important question presented herein arose in connection with the offer in evidence by the Government of a can of cocaine hydrochloride.

Two procurers, in the employ of the Government, went to 138 Union Street, Brooklyn, N. Y., on the night of January 16, 1922, to buy cocaine from the defendants Alba and Centerino. Revenue agents, on watch, followed Centerino, Pace, Thomas Agnello and Frank Agnello from a grocery store at 167 Columbia Street to 138 Union Street, the home of Alba. There the defendants were

apprehended in the very act of selling the cocaine to the procurers. The cocaine, which was the subject of the sale, was seized; the defendants were searched; other packages of cocaine were found on the person of Frank Agnello; and the defendants were then taken to the police station. Certain of the revenue agents then went to 172 Columbia Street, the home of Centerino, and searched the premises, but found nothing. They then went to 167 Columbia Street, there searched the grocery store, and then the bedroom of Frank Agnello, in the rear of the store. On a wardrobe in Frank Agnello's bedroom they found a can of cocaine hydrochloride. The revenue agents had no search warrant.

The can of cocaine hydrochloride was offered in evidence in *rebuttal*, to contradict the statement of Frank Agnello on *cross examination*, that he had never seen the can before it was exhibited to him in the court room.

The can was first offered in evidence on presentation of the case in direct of the Government, but objection was made on the ground that it was obtained through an unlawful search, and that there was no proof of the commission of any crime on the premises. The objection was sustained by the Court, on both grounds, and the can was excluded (fol. 130). On cross examination, Frank Agnello was asked whether he had seen the can at any time and he said that he had not (fols. 708, 711). Upon the evidence of Officer Manning that after the arrest, and after the prisoners were taken to the station house (fol. 719), he first searched No. 172 Columbia Street, the residence of Centerino, and then searched the store at No. 167 Columbia Street, conducted by Pace and Thomas Agnello, and then the bedroom in the rear of the store, occupied by Frank Agnello, where he found the can on top of a wardrobe, the can was received in evidence (fol. 737).

POINT I.

There was error in the admission, over proper objection, of evidence obtained by an unlawful search and seizure.

The can of cocaine hydrochloride was admitted in evidence, not to establish the fact that a crime had been committed, but to attack the credibility of the witness Frank Agnello. Agnello testified in his own behalf. On cross examination the following took place:

> "Q. I show you this can, Mr. Agnello, and ask if you ever saw it before? A. No, sir.
> Q. Did you ever see it in your store? A. No, sir, I did not.
> Q. You are sure about that? A. Yes, sir.
> Q. You sleep back of the store, don't you, at 167? A. I do" (fols. 708-709).
> "Q. You have a wardrobe there, haven't you? A. Yes, two" (fol. 711).

The can was then marked for identification (fol. 711).

On rebuttal Officer Manning testified that after the defendants were arrested "and the prisoners were taken to the station house by other agents" he went first to 172 Columbia Street, the home of Centerino, made a search of the premises there, and then searched the store and living rooms at No. 167 Columbia Street (fols. 719-722). He found the can, Exhibit 12 for Identification, "in the living rooms, on Columbia Street—on top of a wardrobe in the bedroom" (fol. 724). Upon proof that the can contained cocaine hydrochloride it was received in evidence (fol. 736).

Manning was assisted in his search by Oyler, Pacetta and Moog. *As shown by the detailed statement of facts* (Point III) *no one of these officers who made the search of the home of Centerino, and of the store and living rooms at No. 167 Columbia Street, had any knowledge or*

information whatsoever that there was in either of these places a supply of cocaine. Although it was known to *Napolitano* that when Centerino left No. 138 Union Street, "he went out and got the stuff" (fol. 134), and although it was known to *Dispenza* that Centerino said that he would go down to his partner's house and get the stuff (fol. 344), these facts were not known to the agents who made the search. These agents may have inferred that Centerino went out for the purpose of obtaining cocaine, but that is not the evidence of sight, hearing, or smell upon which so much stress is laid in the opinion of the Court below. That was a mere supposition. The fact that certain packages were found on the person of Frank Agnello did not justify a reasonable belief that a further supply of cocaine would be found in his residence. Is it a correct inference that the possession by a person of packages of cocaine or a flask of whiskey furnishes probable cause for the belief that he has in his residence a supply of cocaine or whiskey? Does such belief on the part of a Revenue Agent authorize the search of a residence without a warrant? Would the disclosure of these facts constitute "probable cause" so as to justify the issuance of a warrant, within the requirement of the Fourth Amendment?

Upon the very basis adopted by the opinions of the Judges below, the search in this case was unauthorized. The agents did not have "such direct and personal knowledge as justified the search of the premises of Agnello" (fol. 814). The matters "seen and heard by the officers" were not "most persuasive of crime committed," and search of the bedroom of Frank Agnello was not justified as a "place reasonably indicated by surrounding circumstances as containing incriminating matter" (fol. 819). But the question whether in the particular case, and under the facts and circumstances here presented, the search was justified within the principle laid down by the Court below is unimportant in view of our contention that the

basis of determination adopted in this case was new, *novel, unsupported by authority, destructive of the* requirements of the Constitution, and most pernicious in its consequences to all citizens in the enjoyment of fundamental rights.

The fallacies which have led to the opinions rendered in this case are fundamental. They have no support in precedent, in the historical events that give reason, force, and direction to the provisions of the Constitution, or in the opinions of this Court in cases where the question has come up for consideration. They do violence to established rules and principles of law, whose efficacy has been proved and confirmed by the orderly development of our law through their consistent application. No Court can strike out on new avenues of approach to these fundamental questions without risk to all the rights and privileges of the citizen embodied in the Constitution. Novelty in the rules applicable to the interpretation or application of constitutional provisions has nothing to commend it. Novelty is the way of slight deviations and stealthy encroachments, which lead to gradual depreciation of the rights guaranteed by the Constitution.

> "It will be observed that the Constitution secures the people against 'unreasonable search and seizure' and from the use of the word 'unreasonable,' it might be thought that a reasonable search and seizure, or one that was not unreasonable, would be allowed without a search warrant. But there is no foundation for this construction. The section does not permit any kind or character of search of houses, papers, or possessions, without a search warrant."
>
> *Youmans* v. *Commonwealth*, 189 Ky., p. 159.

The Court below attempted to define the term "unreasonable searches and seizures". In doing so, it first

adopted the principle that the prohibition of unreasonable searches necessarily implied a right to make reasonable searches. In order therefore to determine what was unreasonable, it applied itself to the inquiry of what was a reasonable search. It found that the search of a person at the time of his arrest was accepted by all Courts as authorized and permissible. This right of search as related to the right to arrest was thereupon accepted by the Court as the norm and standard by which to measure the reasonableness of search in other cases. In order however to insure that the search should be incidental to the arrest, and that the mere right to arrest should not be availed of to make a search for evidence, the Court below limited the right to search to the case of an *actual* arrest. And further, in order to insure that the officer making the arrest should have probable cause for the search, it was apparently required that the crime should have been committed in the presence of the officer who made the arrest and who was thereby authorized to make the search.

Judge HOUGH refused to accept this standard, whereby the right of search was dependent on and coextensive with the right to arrest for a crime committed in the presence of the officer. In his opinion no principles whatsoever surround the enforcement of the safeguards of the Fourth Amendment. No limitations derived from the historical origin of the Amendment can restrict its application. He declares reasonableness to be at all times and everywhere a mere question of fact. To require that the arrest must be made *before* the search, to confine the place of search to the place where the crime is committed, to compel the searching officer to be a witness to the crime, "is to introduce false standards" (fol. 818).

We are in accord with Judge HOUGH, that the prevailing opinion does introduce false standards. The opinion

of Judge ROGERS does no more than set up certain arbitrary and artificial standards for determining a question of fact. If the officer actually makes an arrest for a crime committed in his presence, he becomes thereby qualified to act as a searching officer. *The officer may then determine whether he has probable cause to make a search, and may act on his determination.* An officer who has not fulfilled these preliminary requirements is compelled under the Constitution to make oath or affirmation, to describe the place and person to be searched, to satisfy a *judicial* officer that there is probable cause for the issuance of a warrant. All this must be done *before the search.* But if the officer has made an arrest for a crime committed in his presence, he authorizes his own search. If he determines that he has probable cause, no one may properly resist the search. For it is only *after* the search, when the officer has been permitted to testify upon the trial, or to make affidavit upon a motion to compel return, that any Court can determine whether in the mind of the officer there was that knowledge or evidence obtained from sight, hearing, or smell, that furnished probable cause.

The Constitution attempted to set up a safeguard that would prevent the invasion of the home, and for that reason required that probable cause for the issuance of a warrant be shown upon oath to a *judicial officer.* The law established by the opinion below authorizes a search in the first instance, and leaves the question of probable cause to be judicially determined only after the search has been made. Such a procedure may give effect to the Fifth Amendment, for if the Court determines that the officer did not have probable cause, the evidence obtained by the search will not be received. But the Fourth Amendment has become a dead letter. And since the question can only arise where something in the nature of evidence has been procured, and since no human judge can determine *the question of fact* with a mind uninflu-

enced by the successful result of the search, the rights guaranteed by the Fifth Amendment are also in course of being frittered away by "stealthy encroachments."

The Fourth Amendment is instinct with the requirement that the necessity and the propriety of a search warrant shall be determined by a judicial officer before the arrest. These very requirements were the deliberate obstacle to an unreasonable search. Any interpretation of this amendment that does full violence to these requirements is necessarily false to the spirit and intention of the constitutional safeguard. It dispenses totally with the safeguards of the amendment, it authorizes a procedure that is the exact opposite of the constitutional provision, and it is a seven-league step in the direction of arbitrary abuse of power by Government employees, which it was the very purpose of the amendment to forestall.

The right of a man to be secure in his home, to oppose and repel unauthorized invasion of the sanctity of his home by employees of the Government, stands by itself as an indefeasible, unimpairable right. Because the Fifth Amendment secures the citizen against compulsory self-incrimination, it has been held that a search for evidence, is under any and all circumstances and without exception, an unreasonable search under the Fourth Amendment. But without regard to the result of the search, and without regard to the power of the Court to protect the citizen against self-incrimination, the right of the sanctity of the home guaranteed by the Fourth Amendment, is an independent self-subsisting right.

The citizen has a right to be secure against an unauthorized search. He may stand at his door and resist an officer who is not provided with a warrant for the search. He is not required supinely to submit to the invasion of his home, and to wait until the validity of the search is determined in an action for trespass, or in a criminal trial in which he is the defendant and the fruits

of the search are offered in evidence against him. The citizen may stand on the Fourth Amendment. The Fifth Amendment operates only when evidence has been found as a result of the search. The Fourth Amendment furnishes security against the search itself without regard to the result of the search. The protection furnished by the Fifth Amendment comes too late. The constitutional right of the citizen secured by the Fourth Amendment has been irrevocably violated.

The essential purpose of the amendments is to safeguard the innocent. It is recognized that behind this shield many guilty would find refuge. But no principle of interpretation should be adopted that will subordinate the rights of the many innocent to the necessity of apprehending the few guilty.

The effort of the Court below to correlate the right to search to the right to arrest, and to assimilate the principles applicable to the one to the other are based upon an obvious fallacy. The rights of the citizen under the Fourth Amendment were intended essentially to protect the innocent against unlawful invasion of their homes. The authority of a peace officer to arrest was without any limit at common law. The necessity of apprehending the guilty dominated and controlled any consideration for the rights of the innocent. No person, informed by a constable of the charge against him, could rightfully resist arrest for a felony. To accomplish the arrest, the sheriff or constable could call for the aid of any bystander. The necessity of the case compelled the citizen to yield, and to submit to future determination the question whether the arresting officer had probable cause for the arrest.

The exception does not make the rule. The right to search the person in the specific case of his arrest does not furnish the standard by which to determine the reasonableness of a search of his residence. Immunity is the rule; the right to search the person is an exception.

(*Peo.* v. *Chiagles*, 237 N. Y., 193.) It is one of a class which "are necessarily excepted out of the category of reasonable searches and seizures." (*Boyd* v. *U. S.*, 116 U. S,. p. 624.)

In the case of *Entick* v. *Carrington*, 19 Howell's State Trials, 1029, fully considered by this Court in the *Boyd* case, there was also urged that the right to search and seize "bears a resemblance * * * to the known case of search and seizure for stolen goods." Lord Camden resolutely refused to assimilate the right to search for evidence to any proceeding then known.

> "No man can set his foot upon my ground without my license, * * *. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment."

At common law a peace officer is justified in making an arrest without a warrant, though no felony has been actually committed, if he has reasonable ground to suspect that one has been committed, and he acts in good faith and without evil design. (*Burns* v. *Erben*, 40 N. Y., 463.) It is not required that the crime shall have been committed in his presence. The Code of Criminal Procedure of the State of New York changed the common law by providing that a peace officer may without a warrant arrest a person only when a felony has in fact been committed (Section 177, Code of Criminal Procedure). The statement in the opinion of Judge Rogers that that provision was in accord with the rule at common law is incorrect. The case referred to, in support of that statement, *People ex rel. Kingsley*, 22 Hun, 300,

was the case of a misdemeanor, committed out of the presence of the officer making the arrest.

The right to search the home is in no aspect a correlative of the right to arrest. No provision of the Constitution protects the citizen against arrest, except the general provision that he shall not be deprived of his liberty without due process of law. The exigencies that require immediate action where crime has been committed, or, in the case of a felony, where there is no more than a reasonable ground to believe that a crime has been committed, necessarily subject the individual to the risk of mistakes. The law relating to arrest is born of the necessities of the case. Any citizen may arrest; only officers of government may search. Mere arrest does not expose a citizen to the risk of penalties, imprisonment or forfeiture. The rights of a person arrested to a speedy trial, to be informed of the charge, to bail, to counsel, and to a writ of habeas corpus, were all designed to rectify a wrongful arrest or detention. But with these safeguards, the rules applicable to arrest were intended rather to further the prompt and thorough administration of justice than to insure the citizen against possible abuse. In the case of arrest, it has been the experience of government that it is better that an innocent person should be subjected to temporary embarrassment than that too easy a means of escape should be provided for the guilty.

It may be reasonable and desirable to adopt for seizures and searches a rule as broad as that relating to arrests, but the Constitution proceeds upon a different theory. The Fourth and Fifth Amendments did not provide remedial measures for the detection and punishment of crime, but were designed to protect the citizen against the abuse of power by executive officials, and to prevent the recurrence of evils familiar to the founders. The Constitution provides, without any exception, that a search can be made only upon a search warrant, issued upon probable cause, supported by oath or affirmation,

and particularly describing the place or person to be searched. It was framed and designed to insure the fullest protection to the innocent. It recognized that undetected crime was no greater evil than the abuse of power by the executive. The principles relating to the right to arrest, and those relating to the right to search, have nothing in common.

It is significant that in support of the principles adopted by the Court below not a single case in the Supreme Court of the United States is appealed to for authority. It was impossible to refer to any opinion of this Court in support of the view that "an agent of the Government in a case where he can arrest without a warrant and search the person without a warrant" may search also "without a warrant the home of the person so arrested."

This Court has had before it for its careful consideration the question here presented, on several recent occasions. It has not attempted to set up artificial standards of reasonableness, nor to adopt a construction of the Amendment that would impair its efficiency in the protection of the rights of citizens of all classes. It has not yielded to a desire to see the guilty punished at the expense of the probable abuse of arbitrary power by executive officials. It has encountered no difficulty in adopting a test that is easily applicable by the courts to the facts of any particular case. It has aimed to vitalize the purposes of the Constitution, rather than fritter away its efficiency by a strained interpretation. It has adhered strictly to three firmly established principles—*first*, it has given full effect to the words of the Amendment; *second*, it has permitted exceptions only where such exceptions were of a class known to the founders, and established as part of the common law when the Constitution was adopted; *third*, it has not permitted the exceptions to outgrow the law, or to determine the direction of its application.

This Court has without deviation applied the principle that a search of person or of residence, or a seizure of property or effects may not be had for the mere purpose of obtaining evidence. In contrast with this simple rule, we have here suggested for the first time a standard and a test that is derived, not from the words of the Amendment, but from an exception to the rule. The reasonableness of the *arrest*, and the justification of the right to arrest, are made the standards for determining the reasonableness of the *search*, or of the right to make the search. And the exception to the rule that permits a person at the time of arrest to be searched for the instruments of his offense, or to deprive him of the means of resistance or escape, grows not only to overshadow, but to supplant the rule to which it is an exception. With the result that the belief of a revenue agent is made to satisfy the provision of the Constitution that secures home and person against search until a Magistrate entrusted with judicial functions is satisfied by oath that there exists probable cause for the search.

The opinion of Judge HOUGH is based upon the general proposition that the question of reasonableness is a question of fact, and that every search is authorized which is not prohibited.

Against this we have the opinion of this Court:

> "Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures?"
>
> *Boyd* case, *supra*, page 630.

But the gist of the decision by Lord Camden is not that search may not be made for books and papers; that was only the application of the principle of his opinion. The principle of his opinion was that no man may trespass on the property of another unless he is able to show "by way of justification, *that some positive law has justified or excused him.*" All invasions of the sanctity of a man's home are unreasonable unless they are justified. It is not incumbent upon the citizen to justify his resistance. It is incumbent upon the officer to justify his entry.

And even if the right or reasonableness of the search is matter of fact, the Constitution has prescribed how this matter of fact shall be determined. Without exception, it compels proof upon oath, to the satisfaction of a judicial officer, that there is probable cause, and that the search will not extend beyond limits definitely stated in the warrant. In the opinion of the Court beow, and under the rules adopted by the opinions of both Judge Rogers and Judge Hough, probable cause is a fact to be determined by the officer. The citizen resists at his peril. For if it is determined within the rules laid down by the Court below, either that the officer has made an arrest of a person in the actual commission of a crime, or in the opinion of Judge Hough under any circumstances where he has evidence of crime being committed, his search is upheld. It is a reasonable lawful search. So that this question of fact is determined by a judicial officer, *after the search,* upon the evidence of a governmental employee, who testifies to the knowledge that gave him probable cause, and who is under the compulsion of self-interest to justify his search.

The provisions of the Fourth Amendment are clear and intelligible. It is not alone in the interest of the citizen, but in the interest of the executive, that the conditions under which a search warrant should issue shall be precisely defined. Efficiency in the administration

of the criminal law is properly subordinated to some extent to certainty.

In the opinion of Judge ROGERS, the arrest of a person who has committed a crime in the presence of the officer is a prerequisite to the right of a search without a warrant. How far from the place of arrest may the search be conducted? How long after the time of arrest?

In the opinion of Judge HOUGH, arrest is no prerequisite. Arrest is merely in itself an indication that the officer has that knowledge which would justify a search. Given the knowledge, the officer may search without making an arrest.

Judge ROGERS contends that the right to be secure against a search is less sacred in its importance than the right to be secure against arrest. Unlawful *detention* of the person is prevented by several constitutional provisions. The person arrested has a right to be informed of the charge, to have the advice of counsel, to bail, and finally to a writ of habeas corpus to inquire into the cause of his detention. Unlawful and unauthorized arrest can be speedily remedied. But what relief is there against an unauthorized search? The search has been made and completed. It is no answer to the citizen whose rights have been outraged that he can protect himself by proper objection upon a trial to the use of evidence obtained through the unlawful search. The Fourth Amendment protects the home against invasion, without any regard to the success or non-success of the search.

The Constitution does not contain any provision which prescribes limitations upon the right to arrest, except the general provision that a person shall not be deprived of his liberty without due process of law. The Constitution made no change in the common law governing the right to arrest. And the common law, which

gives to a constable the right to arrest without warrant, in any case *where he has reasonable ground to suspect that a felony has been committed,* was based upon the principle of efficient and prompt administration of justice. It was a rule of efficient execution, leaving an abuse of power to be redressed by civil action. The Fourth Amendment provides a safeguard of protection and to effectuate this, imposes requirements that must be complied with as a prerequisite to the right of search.

POINT II.

The decision of the Circuit Court of Appeals is contrary to the decisions of this Court.

Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. The supreme law of the land is not upheld by a too ready acquiescence in such methods. On the contrary this Court has established the rule that error, if error there must be, should extend, rather than narrowly confine, the limits of the protection of the Constitution. This can only be obviated by adhering to the rule that constitutional provisions for the protection of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance.

> "It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."
>
> *Boyd* v. *United States,* 116 U. S., 616, at page 635.

"The warrant is not allowed for the purpose of obtaining evidence of an intended crime, but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar and well understood in the law. Search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous material so kept as to endanger the public safety. A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases, but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons; and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety. In principle they are objectionable; in the mode of execution they are necessarily odious; and they tend to invite abuse and to cover the commission of crime. We think it would gen-

> erally be safe for the legislature to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving the parties and the public to the accustomed remedies."
>
> Cooley's Constitutional Limitations, page 374.

> "They are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such house or place and do show his reasons for such suspicion. For these warrants are judicial acts and must be granted upon examination of the fact."
>
> Hale, 2 P. C., p. 150.

The opinions rendered below make no appeal to the decisions of this Court for support of the standards of reasonableness adopted in this case.

The decision of this Court in *Silverthorne Lumber Co.* v. *United States,* 251 U. S., 385, is made to rest upon the proposition that "as no crime had been committed in the presence of the officers they had no right to make a search without a warrant." But no such view was advanced or approved by this Court in that case. In fact that argument was not made on behalf of the Silverthornes. It does not seem to have occurred, either to the Court, or to counsel, that the fact of arrest was of any importance in determining the validity of the search. We may apply the conclusion of Lord CAMDEN in the *Entick* case, *supra:*

> "If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment."

In the case of *Weeks* v. *United States,* 232 U. S., 383, Weeks had been placed under arrest by police officers. The very day of the arrest the United States Marshal

entered the house of Weeks, made search, and took away certain letters and papers. Prior to the time that the Marshal went to the house, there had been placed in his possession various papers and articles which had been seized by the policeman. How would this case have been determined under the principles laid down in the opinions of the Court below? Did this Court deem it of any importance that the Marshal had reasonable cause to believe that a felony had been committed? Will this Court accept a principle or adopt a principle that would permit a Post Office Inspector who receives a circular through the mail, to act upon his belief that there has been a use of the mails in execution of a fraudulent scheme, arrest the offender, and immediately thereafter search his home and seize the circulars, books and papers relating to the alleged fraud?

In the *Silverthorne* case, *supra*, the two Silverthornes, father and son, had been arrested after indictment. While they were under arrest and detained in custody, the United States Marshal went to the office of the Company and seized their books and papers. Here was an arrest justified by the indictment and the probable issuance of a bench warrant. What effect did this Court give to the search in view of the valid arrest? None whatever.

In the case of *Amos* v. *United States*, 255 U. S., 313, the Court did not inquire what probable cause the Revenue Agents had to believe that Amos was engaged in the commission of a crime. Such an inquiry manifestly would have involved testimony by officers entirely outside the issues.

In no case in this Court have we been able to find any suggestion that the search is ordinarily an incident of the arrest, and that the right to search is at least co-extensive with the right of arrest.

POINT III.

Even upon the principle adopted by the Court below, the search by the officers was not justified, since they did not have such probable cause as would have justified the issuance of a search warrant.

> "And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it" (Cooley's Constitutional Limitations, p. 367).

1.

The possession of opium is not an offense under the Harrison Act.

2.

A warrant to search the premises for cocaine or other narcotic cannot be granted merely upon proof that cocaine or opium will be found upon the premises, but upon proof that a crime against the Statute of the United States is being committed upon the premises by the sale of narcotics.

Narcotics are not forfeitable to the United States. Search warrants, it is said in *Gouled* v. *U. S.*, 255 U. S. at page 309,

> "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a *valid*

> *exercise of the police power renders possession* of the property by the accused unlawful and provides that it may be taker." (Italics ours.)

The Revenue Agents had no information that justified the issuance of a search warrant upon the ground that a crime was being committed at No. 167 Columbia Street.

3.

Assuming that the information possessed by the Revenue Agents was sufficient to enable them to state on oath that there was probable cause to believe that cocaine would be found in the bedroom of Frank Agnello at No. 167 Columbia Street, then a search warrant issued after the arrest would have been a warrant to search for evidence. Such search warrants have been condemned by this Court uniformly and without qualification.

4.

No search is reasonable if the officer who makes the search would have been unable to make oath or affirmation to facts that would establish probable cause, and would designate the place or person to be searched (*Ganci* v. *United States,* 287 Fed. at p. 65). Without making oath, without describing the place to be searched, or the person against whom the search is to be made, may an officer proceed as fully as if he were protected by a warrant? What becomes then of "probable cause"? Does the officer determine this for himself? Does his "reasonable belief" supplant the constitutional requirement of "probable cause"? Does he exercise in this respect the judicial requirement imposed by the Constitution on the Courts of the United States? Assume that the officer may do all this, what facts were within his knowledge that would enable him to make oath that there was a can of cocaine hydrochloride on top of the wardrobe in the bedroom occupied by Frank Agnello?

If it be assumed that, following the arrest, the officers were justified in making a search for evidence, there was no probable cause to believe that evidence would be found in the bedroom of Frank Agnello at No. 167 Columbia Street. "Probable cause" as used in the Fourth Amendment does not mean mere inference or supposition. The oath or affirmation required must be as to facts. The purpose of an oath is to subject the affiant to prosecution for perjury if he bears false witness. The Court or Magistrate acts judicially. It is obvious therefore that the ground of belief and the basis of probable cause must consist of facts, and not mere suppositions.

Inasmuch as the opinions of both Judge Rogers and of Judge Hough rest in part upon the proposition that the Revenue Agents who made the arrest actually had information which furnished reasonable ground for the belief that cocaine would be found in some part of the premises searched, it becomes important to inquire what information the *searching officers* actually had. These officers were on watch and some of them followed the movements of the various defendants. It does not appear by the record that any of the information obtained by Napolitano or Dispenza had been communicated to the officers who made the search. At the time of the arrest the stool pigeons were treated by the officers in the same manner as the defendants, for the obvious reason that it was not desired to expose the complicity of the procurers. The Court is therefore confined to the facts shown by the record to have been known to the particular agents who made the search. These agents were Manning, Oyler, Moog and Pacetta (fol. 126). The testimony of what these officers saw and did on the night of January 16th is as follows:

Manning.

Manning testified that he, Nunzio and Napolitano, the procurers, entered No. 138 Union Street; about an hour later they came out with Alba and Centerino; they then returned into the house with Alba, while Centerino went toward Columbia Street and entered No. 172 Columbia Street (fol. 112). Manning and Oyler followed Centerino. Centerino left No. 172 Columbia Street and crossed to No. 167 Columbia Street, a grocery store (fol. 113). In about ten minutes he came out with Pace and the two Agnellos (fol. 113). These four, still followed by Manning and Oyler, went to No. 138 Union Street. Manning looked in through the window and there "saw Alba go over to the table and lay two packages down on the table" (fol. 115). The officers then broke into the room, placed the defendants, together with Napolitano and Dispenza, "up against the wall and searched each and every one of them" (fol. 120). The marked money was found on Alba and a number of packages were found on the person of Frank Agnello (fol. 121). Thomas Agnello was taken into the next room and asked "where he got the stuff from" (fol. 124). He stated that "it was coming from the sailors off the ships" (fol. 126). Manning then went with Oyler, Moog and Pacetta to No. 172 Columbia Street, to the top floor, where he spoke to Centerino's wife (fol. 127). He then went to No. 167 Columbia Street to "the store and the back rooms and in the yard."

It was at this stage of Manning's testimony that the offer was made to prove what was found during the search of No. 167 Columbia Street, and the testimony was excluded, on two grounds, first, that the search was without a search warrant, and second, that there was no proof of the commission of any crime on the premises (fol. 130).

OYLER.

Oyler saw Alba and Centerino at No. 138 Union Street on the evening of January 16, 1922. He saw Napolitano and Nunzio enter, and later come out with Alba and Centerino. Centerino went down to Columbia Street, and the other three entered 138 Union Street. Oyler followed Centerino (fol. 190). He states that Centerino went direct to No. 167 Columbia Street. In about ten or fifteen minutes Centerino came out with Pace, Thomas Agnello and Frank Agnello (fol. 191). He followed these four men back to 138 Union Street. He did not see anything that took place in the room, until after he and the other officers broke in and lined up the defendants. When he entered the room he found three blue packages lying on the table (fol. 193). Other packages were found on Frank Agnello (fol. 195). Agnello was asked where he got the packages and he said "Some man gave them to him and gave him $5.00 to bring them up" (fol. 195). The money was found on Alba. Thomas Agnello asked to talk with Oyler and Manning and Oyler took him into the next room (fol. 196). Oyler does not testify that Thomas Agnello was questioned concerning the narcotics. Centerino was then questioned and he stated that "he knew nothing about the packages at all" (fol. 200). Pace was next interrogated. He was asked where his place of business was and he said "No. 167 Columbia Street". Oyler then said "That is the same house they brought the narcotics out of? What do you import—narcotics"? Pace made no answer (fols. 201-202). Later Thomas Agnello and Pace spoke to Oyler, and in the course of this conversation, Thomas Agnello said that he and Pace were partners and that they lived at 167 Columbia Street. Oyler testified that he informed them that they were going to search that house and that they said "all right" (fol. 204). Oyler asked Alba where the packages came from and he did not know (fol.

205). The defendants were placed under arrest and taken to the station house. Oyler did not accompany them (fol. 212).

Moog.

Moog testified that on the evening of January 16, 1922, he saw Dispenza and Napolitano enter 138 Union Street. He then saw Alba come out and go to No. 172 Columbia Street. Moog and Oyler followed Alba. In about five minutes Alba came out of 172 Columbia Street with Centerino (fol. 287). These two then went to No. 167 Columbia Street. Centerino entered, and in about a minute returned and joined Alba. They then went to No. 138 Union Street. Centerino came out and again went to 167 Columbia Street. In about ten minutes he came out with Pace and the two Agnello brothers (fol. 287). Moog did not see anything that took place in the room at No. 138 Union Street, except that he saw two blue packages on the table after the Revenue Officers had broken in. Moog did not hear anything that was said by any of the defendants.

Pacetta.

Pacetta did not testify at the trial. He was out of the country at the time of the trial.

On rebuttal Manning testified that "after these arrests were made and the prisoners were taken to the station house by other agents" (fol 719), he made a search of the home of Centerino at No 172 Columbia Street. He found nothing (fol. 720). Then he went to No. 167 Columbia Street, an Italian grocery store with two rooms at the back. He made a search of the two rooms at the back, and "on top of a wardrobe in the bedroom he found a can" (fol. 724).

(Manning states that Officer McCormick was present at the time of this search, but it appears

by McCormick's testimony that he had taken Pacetta to the hospital to have his hand treated, and apparently was not present at the time of the search [fol. 279]).

We have stated in detail the facts known to the officers who made the search, so that it may be readily determined what information they had that justified their belief that a felony was being committed at No. 167 Columbia Street. The search cannot be justified by the results of the search, nor can it be justified by what the officers who made the search may later have learned from the stool pigeons, Dispenza and Napolitana. There is absolutely no evidence in the record that Napolitano and Dispenza communicated to any of the officers what they had learned.

Napolitano testified directly that neither Thomas Agnello nor Frank Agnello nor Pace took any part in the conversation at the time of the sale (fols. 45-46).

There was in fact an entire absence of evidence that in any manner implicated Pace, Thomas Agnello or Frank Agnello, except the mere fact of their presence at the time and place of the arrest. This total failure of evidence it was attempted to supply by the testimony of the stool pigeon, Dispenza. Dispenza was the last witness called by the Government. He testified that

> "Centerino told the defendant Pace and the Agnellos that we were the ones that wanted to buy the coke" (fol. 346).
>
> "Then the defendant Pace asked us if we were ready for business; if we had the money, so I told him 'yes.' So he started to take the packages—one of the Agnellos started to take the packages and put them on the table—the young Agnello took the packages out of the pocket and handed them over to the big Agnello brother, and he put them on the table Alba asked for the money" (fol. 348).

He did not discuss his testimony with Oyler or any of the other agents (fol. 396).

It appears therefore that the agents who made the search had in fact no information that justified them in believing that they would find cocaine, either at the residence of Centerino, at the store conducted by Pace and Thomas Agnello, or in the bedroom occupied by Frank Agnello. They questioned the defendants in order to ascertain where the cocaine came from. They received no information. If it is true that evidence furnished by sight, or hearing, or smell, is sufficient to justify breaking into a home in order to make an arrest, then that kind of evidence was entirely lacking in this case. It is not true that, as stated in the opinion of Judge Rogers, "the agents had such direct and personal knowledge as justified the search of the premises of Agnello—as fully as it did the search of his person." The officers acted upon mere supposition. The inference that they made was not an inevitable inference from the facts known to them. In addition to the packages found on the table, they found certain packages on the person of Frank Agnello. They assumed that a search of Frank Agnello's home might reveal a further supply. But this inference was not so irresistible as the opinion of the Court would indicate. *For the agents did not go to Frank Agnello's home first; they went first to the home of Centerino at No. 172 Columbia Street.*

It cannot be necessary to point out that any revenue agent who finds a person in possession of a hip flask containing whiskey would be equally justified in his inference that the flask had been filled out of a bottle which would be found at that person's residence. If that inference proved unfounded, then of course there would be a still stronger inference that a search of his office would disclose the source of supply.

POINT IV.

The indictment does not state facts sufficient to constitute a crime.

A motion in arrest of judgment was made on the ground that the indictment does not state facts sufficient to constitute a crime (fol. 768). While the defect herein discussed was not specifically brought to the attention of the Court, it is a matter of substance and is properly presented by a general motion. The indictment charges a conspiracy to sell heroin and cocaine. It does not charge a conspiracy to sell *within the United States.* The sale of cocaine without the United States is not made an offense. In order to charge a substantive offense the indictment must charge an actual sale within the United States. In order to charge a conspiracy to commit this offense, the conspiracy must be to sell within the United States.

It is respectfully submitted that the judgment of the Court below should be reversed.

Dated, New York, November 21, 1924.

Respectfully submitted,

BATTLE, VANDIVER, LEVY & VAN TINE,
Attorneys for Petitioners.

GEORGE GORDON BATTLE,
ISAAC H. LEVY,
of Counsel.